80-926

No.

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In the Supreme Court of the United States

October Term, 1980

JOHN HEDMAN, MICHAEL JERCICH, THOMAS KARNICK and HENRY LARSEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE QUESTIONS PRESENTED FOR REVIEW

1. When a public official obtains property from another on the charge under Title 18 U.S.C. §1951, that it was obtained solely "under color of official right", must inducement for the payment come from the official, or is the mere fact of receipt sufficient for conviction?

2. Since Title 18 U.S.C. §1951, concerning the obtaining of property "under color of official right" allows of at least two permissible interpretations, is it constitutonal?

3. Is the Seventh Circuit's interpretation of such section, when viewed together with other subsisting federal laws, consistent with a reasonable effectuation of Congressional intent?

4. When two permissible interpretations of a statute are feasible, if not entirely reasonable, does not the policy of lenity foreclose the Seventh Circuit interpretation?

5. May the initiator and giver of a bribe to a public official be, at the same time in the same transaction, the victim of an extortion by the public official he was indicted for, and pleaded to, bribing.

6. When a person has been charged with a material misrepresentation on his tax return (26 U.S.C. §7206(a)) in that he stated his gross income to be a certain amount, "when he then and there knew and believed, his income was substantially in excess of that sum," is it consistent with the Fifth Amendment that conviction may rest on *any* material misrepresentation?

7. When the Congress has deemed guidance necessary in defining "substantial understatement" in the Internal Revenue Code for purposes of minor civil disadvantages,

may a jury find felonious guilt, without any guidance, except its own perceptions of what substantial understatement means when it is criminally charged?

8(A). Where petitioner Karnick was named in only 2 of 19 counts, was the subject of 167 of some 1279 pages of evidentiary trial material, was the only defendant not charged with tax offenses, and where his co-defendants were charged in 17 separate substantive offenses—8 of which were Hobbs Act charges naming "extortees" with which petitioner Karnick is not even alleged to have been connected—and where different defense tactics of his co-defendants resulted in the court advising the jury (over Karnick's objection) that no inference may be drawn from any defendant's failure to testify, as well as in the reviewing court condoning as "invited response," certain prosecutorial argument attacked by Karnick on appeal, though the invitation was from a co-defendant's counsel, was the totality of the circsumstances such that severance was required in the interest of justice, under F.R.Cr.P. 14, rendering the trial court's denial of Karnick's motion for severance an abuse of discretion?

8(B). Alternatively, was joinder improper from the outset under F.R.Cr.P. 8, entitling Karnick to a reversal, for the conspiracy count failed to encompass any of the counts 6 through 19, none of which named or otherwise involved him?

8(C). May petitioner Karnick's convictions stand affirmed on the basis that Karnick failed properly to have labelled his motion for severance?

LIST OF PARTIES TO THIS PROCEEDING

All of the captioned Petitioners seek this review.

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NO.

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable: The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, JOHN HEDMAN, MICHAEL JERCICH, TOM KARNICK and HENRY LARSEN, pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals entered in this cause.

OFFICIAL AND UNOFFICIAL REPORTS OF THE COURT BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit affirming the convictions of your

Petitioners is not officially reported but is printed in the Appendix hereto (Appendix A). The Order of said Court denying rehearing will probably not be reported, but is printed in the Appendix hereto (Appendix B).

GROUNDS FOR JURISDICTION

The said Opinion and judgment of the Court of Appeals for the Seventh Circuit was filed on August 29, 1980 (Appendix A). A Petition for Rehearing, timely made, was denied on October 30, 1980 (Appendix B). No further orders granting extensions of time were sought, nor entered. This Petition is filed within 60 days of the denial of the Petition for Rehearing by the Court below. The jurisdiction of this Court is conferred by Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Amendment 5 Constitution of the United States
Amendment 6 Constitution of the United States
Title 18 U.S.C. §201(c)
Title 18 U.S.C. §201(f) & (g)
Title 18 U.S.C. §371
Title 18 U.S.C. §872
Title 18 U.S.C. §1951
Title 18 U.S.C. §1952
Title 21 U.S.C. §849(e)
Title 26 U.S.C. §6501(e)(1)(A)
Title 26 U.S.C. §7206(a)
Rule 8(a) Federal Rules of Criminal Procedure
Rule 8(b) Federal Rules of Criminal Procedure
Rule 14 Federal Rules of Criminal Procedure

All above set forth in Appendix C appended hereto.

STATEMENT OF THE CASE

The court of first instance herein was the United States District Court for the Northern District of Illinois, Eastern Division, and this action was commenced by the filing of an indictment charging violations of Title 18 U.S.C. §371 and §1951 and Title 26 U.S.C. §7206. Cast in nineteen counts, the petitioners were jointly charged only in Count I, which alleged a conspiracy under Title 18 U.S.C. §371, to violate the provisions of Title 18 U.S.C. §1951. The jurisdiction of that Court derives from the provisions of Title 18 U.S.C. §3231.

The Court of Appeals made a thorough delineation of the facts, except it assumed the payments made by the dealers to Petitioners were illegal, though there was no evidence at all as to the agreement, if any, under which the moneys were delivered. We therefore, consider the redundant use of the term "payoffs" to be inaccurate, and have substituted "payments" therefor. Such portions, and unnecessary portions (as Interstate Commerce, which is no element of this Petition) are deleted. All deletions are noted by asterisks for comparison, if deemed necessary.

On June 13, 1978, the Federal Grand Jury returned a nineteen count indictment charging the Petitioners, John Hedman, Michael Jercich, Thomas Karnick and Henry Larsen, with various violations of federal statutes arising from the acceptance of monies allegedly extorted by them in their capacities as Building Inspection Supervisors assigned to the Construction and Technical Inspection Bureau of the City of Chicago. Count One of the indictment charged all four Petitioners with conspiracy to commit extortion through the wrongful use of their official positions, in violation of 18 U.S.C. §1951. Counts Two through

Thirteen of the indictment charged the Petitioners individually with substantive violations of Section 1951 by the extortion of money from various building contractors under color of official right. Counts Fourteen through Nineteen charged Petitioners Hedman, Jercich and Larsen with the failure to report the income received from these * * * activities on their federal income tax returns for the years 1973 and 1974, in violation of 26 U.S.C. §7206(1). * * * At the conclusion of a two week jury trial, the jury returned guilty verdicts against each Petitioner on all counts of the indictment, with the exception that Michael Jercich was found not guilty in Count Twelve. On December 19, 1978, Judge Bua sentenced Petitioners, Hedman, Jercich and Larsen each to one year in the custody of the Attorney General, three years' probation, and imposed a $5,000 fine. Thomas Karnick was sentenced to one year of custody on a work-release program, three years' probation, and received a $1,000 fine.

* * * The Petitioners commenced their employment with the City of Chicago during the 1950's as inspectors for the Department of Buildings. In 1969 and 1970, they were promoted to the positions of Supervisor. In those positions, the Petitioners were responsible for supervising the inspection, by six district inspectors, of all new construction and remodeling in the geographical areas of the City of Chicago to which they had been assigned. The Chicago Building Code requires that anyone who undertakes any construction work, structural repairs, additions or remodeling in the city, secure a building permit from the Department of Buildings. The fee for such permits varies with the type of construction undertaken. For example, the permit fee for a frame garage was $24 in 1971 and $47.50 in 1976. Once the permit is obtained, the construction may proceed. At various stages of the construction

a building inspector from the City of Chicago inspects the project to insure compliance with the building code. Upon completion of the construction, the inspector validates the permit.

A. Counts One through Five

These counts alleged the receipt of extortionate payments by the Petitioners from Danley Lumber Company, an Illinois corporation whose principal business is the construction of residential garages. * * *

Since its inception in 1959, Danley has constructed a substantial number of garages in Chicago that violated the Building Code, usually because the garages were too large or too close to the lot line. On such occasions, Danley would either fail to obtain a building permit or obtain one through the submission of a false application. * * *

* * * From the mid-1960's until 1976, the task of making payments on construction that violated the Chicago Building Code was handled by Bentley Weitzman's father, Harry Weitzman. When a job did not violate the building code, Harry Weitzman would file a permit application and pay the required fee to the City of Chicago.

A routine procedure was established at Danley for processing non-conforming garages. When a job violated the Building Code, the employee at Danley who processed that job order would give Harry Weitzman a slip of paper indicating the address of the job and a notation that a violation existed. Weitzman would then write the name of the area supervisor for that job on the slip, and return the slip to the job file. At the same time, Weitzman would make an entry on a list he maintained of all non-conforming jobs. When the garage was being built, the slip would be returned to Weitzman. He accumulated slips for several

days and then gave them to Irving Lazarus, Vice President of Danley. Lazarus would * * * place $25 per slip in an envelope with the slips, and give the money and slips to Weitzman. * * *

When Harry Weitzman received the cash and slips from Lazarus, he would delete the job addresses from his list. He would then write the name of the supervisors on separate envelopes, place the appropriate amount of money in each envelope, and personally deliver them to all four Petitioners at either offics in City Hall or their homes. On occasion, Weitzman would give to one supervisor an envelope to be delivered to another supervisor.

From 1968 or 1969 until 1976, Harry Weitzman kept a diary of these payments. At the top of some pages of the notebook, Weitzman wrote the first name of a supervisor, e.g., "Mike," "Tom," "Hank," and "John." Also listed on these pages were the addresses of the non-conforming job sites, as well as the amount, the dates, and the places of the payments made to each supervisor for those jobs. The diary detailed payments that were made to all four Petitioners individually, as well as payments that were made to one supervisor for delivery to another.

B. Counts Six through Eight

These counts related to the extortionate payments allegedly received by Hedman, Jercich and Larsen from the All State Lumber Company. * * *

Like the Danley Lumber Company, All State built garages that violated the Chicago Building Code. On such occasions, All State would not obtain a building permit, but would instead make a payment to the Building Inspection Supervisor assigned to the district in which the garage was constructed.

When All State commenced a job that violated the Building Code, either the garage superintendent or the remodeling superintendent would telephone the appropriate supervisor and give him the address of the non-conforming job site. The All State employee would then give a slip of paper to the assistant bookkeeper, indicating the job name, the address, the supervisor, and the amount of money to be paid to the supervisor. The bookkeeper would then write the name and address of the job on a separate piece of paper and place it, along with $25, into an envelope bearing the supervisor's name. The envelope often contained several job slips and amounts of money ranging from $25 to $100. The supervisors would then stop by the All State office and pick up the envelopes bearing their names. Three of the petitioners, John Hedman, Michael Jercich, and Henry Larsen, received payments in this fashion from All State. On occasion, one supervisor would pick up the envelopes addressed to another supervisor.

The money used for the payments was obtained from the All State petty cash fund and was recorded on All State's books as a "permit fee." Thus, each entry in the All State accounts of $25 for a "permit" reflected a payment. By comparing the assignment maps of the Department of Buildings to the address of each payment, it was possible to approximate the amount of money paid to each of the three supervisors. Between 1971 and 1974, approximately $11,575 was paid collectively to the supervisors by the All State Lumber Company.

C. Counts Nine through Ten

These counts related to payments allegedly made to petitioners Hedman and Jercich by the Ashland Building and Improvement Company, a firm engaged in general repair work and specializing in porch construction. * * *

On a number of occasions, Ashland would start a job before a permit was obtained or complete a job in violation of the Building Code and fail to secure a permit. For these jobs, Ashland would pay money to Building Inspection Supervisors for the City of Chicago who were in charge of inspection for the districts where the nonconforming jobs were located. Frank Spatz, the President of Ashland, would either telephone the appropriate supervisor at his home or at City Hall, or the supervisor would visit Ashland's corporate offices. Spatz would inform the supervisor of the job violation and its location. After talking with Spatz, the supervisor would stop by Ashland's offices and receive the payment from Spatz, or if Spatz was not in the office at the time, the money would be left in an envelope for the supervisor to pick up. Payments to the supervisors would be made either in cash or by a check. Ashland checks were written to both John Hedman and Michael Jercich in the amounts of $100 each. In several instances, Michael Jercich directed that the checks issued to him be made payable to other payees.

Spatz maintained a written record of the payments that were owed, and after a payment was made he destroyed the record. * * * A job order number was inscribed on each check to indicate the job for which the payment had been made, and the checks were recorded on Ashland's books as "finder's fees." Spatz would then place the money in a drawer in his office before paying the supervisors or would give it to his secretary for delivery in his absence.

D. Counts Eleven and Twelve

These counts involved payments allegedly made to Petitioners Hedman and Jercich by Airoom, Inc. Airoom is a construction company that specializes in building room additions in Chicago and its suburbs. * * *

Airoom would sometimes begin construction in Chicago before a building permit was obtained, or would perform the work without ever obtaining a permit. On these occasions, the construction superintendent of Airoom were authorized to make payments to building inspectors. Burton Klein, President and owner of Airoom, testified that he would telephone petitioner Hedman and provide him with the name and address of the non-permit job. Hedman would then telephone Klein to arrange a meeting at either Airoom's offices or at a restaurant. At these meetings, Klein would pay Hedman in cash from his Airoom salary. Klein paid Hedman for approximately ten jobs built by Airoom in Chicago. The payment was usually $25 for a job commenced without a permit and $50 for a job completed without a permit. * * *

E. Count Thirteen

This count relates to payments allegedly made to John Hedman by Solar Construction Company. Solar builds garages and room additions in Chicago and the surrounding suburbs.

Between 1972 and 1974 Solar completed approximately sixty-five jobs in Chicago without obtaining building permits. On other occasions, Solar would obtain a building permit but construct a garage that did not conform to the permit. In either of these cases, Robert Pareti, owner of Solar, would telephone Hedman at City Hall or at his home to advise him of the deficiency. In most instances, Hedman would give his consent over the telephone and Pareti would make a notation on the job file. Pareti would then arrange for a Solar check payable to a fictitious payee or to "cash" to be sent to Hedman's residence. These payments were recorded on Solar's books as "permit" expenses.

F. Counts Fourteen through Nineteen

These counts charged Petitioners Hedman, Jercich and Larsen with the failure to report the payments received from the above contractors on their federal income tax returns for 1973 and 1974.

John Hedman filed a federal income tax return for 1973 in which he stated that his income was $16,426. In his 1974 tax return, Hedman stated that his income was $19,214. On both returns, Hedman listed as his sources of income wages and mileage reimbursements from the City of Chicago, interest income, and an income tax refund from the State of Illinois. He did not report as income the approximately $1,125 in payments in 1973 and the approximately $1,575 received in 1974.

Henry Larsen stated on his 1973 and 1974 federal income tax returns that his income was $18,703 and $20,977.63, respectively. He did not report $1,125 received as payments in 1973 or the $800 he received in 1974.

Similarly, Michael Jercich failed to include as income the payments he received for 1973 and 1974. His adjusted gross income for 1973 was reported as being $18,087.72, which did not include $1,925 received as payments. His adjusted gross income for 1974 was $17,343.45, which did not include $1,850 he received in payments during that year. (App. A, pp. 2 through 10)

Of particular pertinence though not noted in the Court of Appeals "Statement of Facts" is that each of the "victim" companies recited in the first thirteen counts of this indictment have been indicted for bribery and convicted on pleas of guilty, in the same pleaded circumstances as are reflected in these statutory extortion charges brought against these Petitioners (Tr. 746-749; 787; 848;

937; Defendant Jercich Exhibits 3, 4, 5, 6 and 7). Those indictments, as well as this indictment, were all returned by the same Special November 1975 Grand Jury.

There are also two instructions that were given the jury that are essential to consideration of this Petition. Without detail, there is no argument made to this Court that was not advanced to the trial court, and the Court of Appeals in respect thereof including, as to the §1951 counts, the necessity of proving "inducement", and differentiating between "extortion", bribery and gratuity, and alternative instructions were proffered and declined. In respect of the Internal Revenue Counts, and particularly the allegations of Counts Fourteen through Nineteen that the respective Petitioner had reported "substantially" less than the gross income received, an instruction was tendered giving the only apposite definition in the Internal Revenue Code, which articulated the meaning of "substantial omission", which was refused.

The complained of instructions are:

> "The jury is further instructed that extortion under color of official right means the obtaining of money by a public official through wrongful use of his office when the money obtained was not lawfully due and owing to him or to the office which the public official represented.
>
> "It does not matter whether the public official induces the payment to perform his duties or not to perform his duties. Extortion under color of official right does not require proof of specific acts by the public officials demonstrating force, threats, or the use of fear so long as the victim consented because of the office or position held by the official who obtained the money.
>
> "If the public official knows the motivation of the victim focuses on the public official's office and money

is obtained by the public official which was not lawfully due and owing to him or the office he represented, that is sufficient to satisfy the requirements of the law of extortion under color of official right.

"The mere voluntary payment of money would not constitute extortion.

"Furthermore, that the transaction may also have constituted bribery is of no consequence in considering whether extortion under color of official right was committed.

"The same transaction may constitute bribery by the person paying the money and extortion under color of official right by the public official who receives it. Tr. at 1568-69." (App. A. pp. 15-16, fn 4)

and

"The jury is further instructed that each of the tax counts alleges that the particular defendant received substantial other income in addition to the total income reported on the return. It is not necessary for the government to prove the exact amount of the additional income. It is sufficient if the government proves beyond a reasonable doubt that the defendant had income substantially in excess of the total income he reported on his return." (App. A. p. 19, fn 6).

Facts re Karnick's Motion for Severance

Defendant Karnick's pre-trial motion for severance from his co-defendants for trial was denied. (Tr. 13)

* * *

During the course of the trial, the prosecution asked Bentley Weitzman whether, "from 1959 until the mid-1960's did you follow a regular procedure personally with regard to these jobs that violated the Building Code?" (Tr. 124) Upon Karnick's objection that he did not become a Building Code Supervisor until January, 1970,

(Tr. 124), the court received the evidence, instructing the jury not to consider this evidence as to Karnick or Hedman. (Tr. 129)

Karnick renewed his motion for severance, and, upon denial, moved for mistrial, also denied. (Tr. 130)

* * *

Arthur W. Malina, an employee of Allstate Lumber Co., gave testimony regarding defendants Jercich, Larsen and Hedman. (Tr. 381-525) Karnick moved for a severance because the government completed its evidence with respect to Danley Lumber Co. and on the conspiracy count 1. (Tr. 389-90) The court overruled the motion for severance, directing the jury not to consider the prospective evidence against Karnick. (Tr. 396)

* * *

During the testimony of another employee of Allstate Lumber Co., one Anthony Lamantia, (Tr. 526), counsel for Karnick indicated there would be motions for severance with respect to all future witnesses because the testimony would not be applicable to Karnick. (Tr. 553, 556). The court instructed the jury that ". . . all testimony you will hear from here on end until the government closes its case will not relate to Mr. Karnick . . ." (Tr. 556)

* * *

Still other circumstances pertaining to whether Karnick could receive a fair trial absent a severance from the co-defendants include the following:

As the trial progressed, Karnick was disadvantaged by being "at odds" with his co-defendants concerning various "trial strategy" decisions, such as: The co-defendants wanted a "no inference from failure to testify" instruction, which Karnick did not want, but had no choice, in the joint trial, but to have the jury so advised. (Tr. 1346).

Other examples of situations unfair to Karnick which simply would not have developed, had his motion for severance been allowed, are found in the conference on instructions. (See, *e.g.*, Tr. 1386-87, 1389.)

Similarly, Karnick was prejudiced when the Court of Appeals excused the government's argument on the basis it was "invited response" to defense argument (App. 28); however, it was counsel for a co-defendant, not for Karnick, who did the inviting.

* * *

Finally, Karnick was named in 2 of 19 counts, and only some 167 of 1279 pages of evidentiary trial material pertained to Karnick.

ARGUMENT

We respectfully request this Court to issue its Writ of Certiorari to review the judgment of the Court of Appeals in this case on the following grounds:

1. There are conflicts among the Circuits as to whether inducement and the initiative for the obtaining of property must come from the public official to sustain a conviction for "extortion", as it is used in §1951, when that conviction rests solely on "color of official right".

The Court of Appeals for the Seventh Circuit has held in this case that:

> "It is settled law in this Circuit as well as others that in a Hobbs Act prosecution for extortion under color of official right it is unnecessary to show that the defendant induced the extortionate payment or that the payor was entitled to the benefit obtained from such payment. The government is merely required to prove that a public official obtained money to which he was not entitled and which he obtained only because of his official position." (App. A, p. 17-18)

The decision also provides that when, as here, no proof is adduced as to the conditions or agreement (if any there were) in the passage of the property, it is a permissible legal inference that the public official was "not entitled" to the money.

> "No testimony was elicited on either direct or cross-examination that the money was owed to Hedman,[1] the Department of Buildings, or the City of

[1] "Hedman" is referred to only in a generic sense, and apparently intended to apply to all Petitioners.

> Chicago. In the absence of such evidence, together with the fact that the money was paid only when construction was started before a permit was obtained or when no permit was obtained, the jury could have reasonably found that the money was not lawfully due Hedman or the City of Chicago." (App. A, p. 15-16)

Thus, the decision of the Seventh Circuit is a holding that when a public official receives money, it will be factually inferred he was not entitled to it, and that he received it only because of his official position. Aside from endorsing an illegal factual inference, the ruling is that whenever a public official receives money, be it gift, contribution, bribery or whatever, such receipt constitutes "extortion . . . under color of official right" as defined in Title 18 U.S.C. §1951(b)(2). It stands for the proposition that, no matter if it was freely given and unsolicited, the fact of receipt of money by a public official is statutory extortion. No case heretofore has ever stood for such a proposition,[2] and the holding is in clear conflict with decisions of other circuits, and rulings.

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[2] It is important that the extortion charged here was charged only on "color of official right," without the statutory alternatives of "force, violence or fear."

While other courts have discussed the meaning of "under color of official right," they have affirmed convictions on the alternative finding that "fear of economic loss" is present. *United States* v. *Sopher*, 362 F.2d 523 (7th Cir., 1966); *United States* v. *Irali*, 503 F.2d 1295 (7th Cir., 1974); *United States* v. *Crowley*, 504 F.2d 992 (7th Cir., 1974); *United States* v. *Price*, 507 F.2d 1349 (4th Cir., 1974); *United States* v. *Brown*, 540 F.2d 364 (8th Cir., 1976); *United States* v. *Adcock*, 558 F.2d 397 (8th Cir., 1977); *United States* v. *Reilly*, 456 F.Supp. 211; Aff'd 601 F.2d 577 (3rd Cir., 1979). Others have come to a determination that bribery and extortion are not *necessarily* mutually exclusive. *United States* v. *Braasch*, 505 F.2d 139 (7th Cir., 1974); *United States* v. *Trotta*, 525 F.2d 1096 (2nd Cir., 1975); *United States* v. *Hathaway*, 534 F.2d 386 (1st Cir., 1976); *United States* v. *Hall*, 536 F.2d 313 (10th Cir., 1976); *United States* v. *Harding*, 563 F.2d 299 (6th Cir., 1977).

We need only refer to the bases cited by the Seventh Circuit as constituting "settled law . . . that . . . it is unnecessary to show that the defendant induced the extortionate payment . . ." (App. A., p. 18 and fn. 5) to put the lie to that extravagant statement. Of those cited for reliance, we start with *United States* v. *Harding*, 563 F.2d 299 (6th Cir., 1977) (where the defendant "suggested he could assist Ms. Johnson in passing her broker's examination by selling her a copy of the questions and answers for $300" (563 F.2d at 301); we continue with *United States* v. *Hathaway*, 534 F.2d 386 (1st Cir., 1976) where the Court said clearly the Trial Court had correctly charged that the incentive and the initiative for the payment must come from, or is made on the part of, the public official, and not the voluntary payment on the part of the so-called victim, which instruction the First Circuit held "clearly precluded conviction based upon passive receipt of the money" (534 F.2d at p. 394). The case implies joint inducement might suffice but the inducers must include him who has or pretends to "official right". We continue with *United States* v. *Brown*, 540 F.2d 364 (8th Cir., 1976), where defendant required his lady friend's apartment be financed by the contractor in exchange for getting on the bid list. In *United States* v. *Hall*, 536 F.2d 313 (10th Cir., 1976), the governor of the State of Oklahoma agreed to use his influence to sell certain notes to the Oklahoma Retirement System but "He demanded, however, $100,000 to be divided between him and Mooney" (536 F.2d at p. 317); *United States* v. *Price*, 507 F.2d 1349 (4th Cir., 1974) concerned a payment "of $12,000 in cash to Price in exchange for the latter's assurance that the motel would receive its occupancy permit," which the Court characterized, even in its brief opinion as

"appellant's corrupt offer [which] played upon his apprehension [of financial injury] was certainly inferable, if not obvious" (507 F.2d at p. 1350). *United States* v. *Mazzei*, 521 F.2d 630 (3rd Cir., 1975), was a case in which the defendant informed a lessor, hopeful of obtaining the State as a tenant that "it was the practice on all state leases that a ten per cent of the gross amount of the rentals would be paid to a senate finance re-election committee . . ." (521 F.2d at p. 641) The final case, cited by the opinion, *United States* v. *Trotta*, 525 F.2d .1096 (2nd Cir., 1975) is a reversal of a dismissal of a Hobbs Act indictment for insufficiency, holding "it is the use of the power of the public office itself to *procure* the payments of moneys not owed to the public official or his office that constitutes the offense." (Our emphasis)[3]

Not one of these cases relied on stood for the proposition that "it is unnecessary to show that the defendant induced the extortionate payment . . ." Each cited case clearly showed such inducement.

Other cases, too, make undeniable implications that demand or threat by the official is necessary to bring the transaction within contemplation of Hobbs. *United States* v. *Wright*, 588 F.2d 31 (2nd Cir., 1978); *United States* v. *Addonizio*, 451 F.2d 49 (3rd Cir., 1972); requiring initiative to come, at least in part, from the official, and affirmatively precluded a passive receipt of money; *United States*

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[3] Another case relied on as authority, though not directly on this point is *United States* v. *Kuta*, 518 F.2d 947 (7th Cir., 1975), where the defendant, as a Chicago Alderman, agreed not to object to a zoning variance. When the payor came to see him at his request, he responded $1,500, when the payor suggested he owed the Alderman "something".

v. *Hyde*, 448 F.2d 815 (5th Cir., 1971), implying that some element of coercion or intimidation must be present, even though it may consist of a threat to exert valid official power. It should be noted that the *Braasch* case (*United States* v. *Braasch*, 505 F.2d 139 (7th Cir., 1974), upon which this decision places principal reliance follows the exact reasoning of *Hyde* stating "It matters not whether the public official *induces* payment to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position." (our emphasis). Inducement by the official remains an inperative. Nonetheless, in respect thereof, the Court below stated the issue made:

> ". . . The appellants claim it was error to refuse their tendered instructions which in substance would have required the government to show that the appellants were the initiators or inducers' of the alleged payments. . ." (App. A, p. 16-17)

Instead, it approved the charge to the jury that "It does not matter whether the public official induces the payment to perform his duties or not to perform his duties" (idem)

Coupled with the fact that the Court below recognized no evidence that the payments were in anyway induced by petitioners, this instruction cannot be read other than that inducement is an unnecessary element of proof, and that any monies paid to a public official, coupled with the payor's being motivated, at least in part, by the official position held, constitutes statutory extortion. This, we submit, is in conflict with the many circuits above cited

and with the intent of Congress[4], or, alternatively, the statute is unconstitutional.

2. This case demonstrates that the Federal Criminal Statute (18 U.S.C. §1951) admits of two diverse interpretations, and its intended meaning is rendered debatable, at least. This Court should issue its Writ of Certiorari to review the Statute, because its Constitutionality is in doubt.

The wide divergence of interpretation of the "color of law" portion of §1951, demonstrated by the equally wide conflicts in the Circuits, can be traced directly to and from the terms of the Statute (§1951(b)(2)), which provide:

> "The term 'extortion' means the obtaining of property from another, with his consent induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." (Title 18 U.S.C. §1951(b)(2))

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[4] In 1978 this Court in *United States* v. *Culbert*, 435 U.S. 371 had occasion to cite portions of the legislative history of the Hobbs Act. At page 379, the following appears:

> "Indeed, many Congressmen praised the bill because it set out with more precision the conduct that was being made criminal. As Representative Hobbs noted, the words robbery and extortion 'have been construed a thousand times by the courts. Everybody knows what they mean.' 91 Cong.Rec. 11912 (1945). See also *id.*, at 11906 (remarks of Rep. Robinson); *id.*, at 11910 (remarks of Rep. Springer); *id.*, at 11914 (remarks of Rep. Russell). In the wake of the Court's decision in *Teamsters*, moreaver, a paramount congressional concern was to be clear about what conduct was prohibited: 'We are explicit. That language is too general, and we thought it better to make this bill explicit, and leave nothing to the imagination of the court.' 91 Cong.Rec. 11904 (1945) (remarks of Rep. Hancock).
>
> See *id.* at 11912 (remarks of Rep. Hobbs)."

The conflicts arise from two possible readings of the statute, when stripped of impertinent material:

(a) "(2) The term 'extortion' means the obtaining of property from another with his consent, induced . . . under color of official right."

-or-

(b) "(2) The term 'extortion' means the obtaining of property from another, with his consent . . . under color of official right."

Such possible diverse interpretations would and do, we submit, render the statute impermissibly vague, and, therefore, unconstitutional. Demonstrably, the perimeters of the "color of law" portion of the statute are speculative, and state public employees or officials[5] are not given fair warning of whether their activities are criminal or not. A fair reading of the statute is that receipt of property by them must have been induced by them. It lacks the essential fairness required by our constitution to find at the conclusion of trial by their peers that "it is unnecessary to show the defendant induced the extortionate payment" (App. A, p. 18). On the contrary "[i]t is settled that when the law is vague or highly debatable, a defendant—actually or imputedly—lacks the requisite intent to violate it." *United States* v. *Gritzer*, 498 F.2d 1160, 1162 (4th Cir., 1974).

We submit this statute is clearly shown to be capable of at least two interpretations, and that at least two diverse interpretations have been applied to it among the circuits. It thus offends the Fifth and Sixth Amendments and is unconstitutional, and so this Court should declare it.

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[5] We know of no federal employees or officials that have been prosecuted under the Act, though fairly included in its terms.

3. The present determination by the Court of Appeals for the Seventh Circuit that any receipt of money or other valuable by a State official or employee, without any evidence of its purpose or of the agreement or arrangement under which it was delivered, violates the "color of official right" portion of the statute, merits this Court's inquiry into whether Congress could, consistent with other subsisting laws, have intended such an interpretation, and this Court, in exercise of its supervisory powers, should mandate logical restraint in application.

In this consideration, we ask the Court to re-examine the second permissible reading of §1951(b)(2), submitted under point 2 of this Argument.[6] On that permissible reading, prosecution is authorized against any official. It eliminates inducement. It eliminates "color of . . . right," and the decision would include classic common law extortion, bribery, gratuities and contributions, and apply to federal as well as state officials.[7] However, except for contributions, the Congress has simultaneously existing statutes directed to the activities of federal officials, which delineate and emphasize the distinctions between activities, which under the decision of the Seventh Circuit here, have been molded into the cloak of extortion "under color of official right," and all carrying substantially lesser penalties than § 1951. They are: Extortion, Title 18 U.S.C. §872, maximum penalty 3 years and $5,000; Bribery, 18 U.S.C. §201(c), maximum penalty 15 years and 3 times the payoff or $20,000; Illegal Gratuity, 18 U.S.C.

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[6] (b)"(2) The term 'extortion' means the obtaining of property from another, with his consent . . . under color of official right."

[7] See footnote 5 supra.

§201(f) or (g), maximum penalty 2 years and $10,000. For distinction among the three, see *United States* v. *Brewster,* 506 F.2d 62 (C.A.D.C., 1975). Yet the most minor state official for any conduct similar to any of the three is uniformly subject to a maximum penalty of 20 years and $10,000, under this permissible reading of §1951.

We submit that respect for the wisdom of Congress should preclude this interpretation which treats an official with such disparity, depending on which sovereign is his employer, or through which plebiscite he secured his office.

This Court should exercise its supervisory power to prevent attributing such irrationality to the Congress.

4. In the face of two permissible readings of a statute, the failure to exercise the policy of lenity conflicts with prior decisions of this Court.

This issue is plain. One reading of a highly penal federal criminal statute requires proof of defendants' "inducement" of payment as an essential element, the other does not. While the former reading seems patently more sensible, we cannot say the latter is not grammatically permissible.

It is in just such situations and to avoid the ultimate rebuff of a declaration of unconstitutionality that the policy of lenity[8] was born. There can be no clearer case in which it should be directed by this Court to be applied.

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[8] *Adamo Wrecking Co.* v. *United States,* 434 U.S. 275, 285 (1978); *United States* v. *Bass,* 404 U.S. 336, 348 (1971); *Rewis* v. *United States,* 401 U.S. 808, 812 (1971); *Bill* v. *United States,* 349 U.S. 81, 83 (1955).

5. The concept advanced by this case that there is no distinction between bribery and statutory extortion under color of official right is in conflict with the Eighth Circuit decision in United States v. Adcock, 558 F.2d 397 (8th Cir., 1977), and the Sixth circuit decision in United States v. Shelton, 573 F.2d 921 (6th Cir., 1978) and corrupts the intent of United States v. Staszcuk, 502 F.2d 875 (7th Cir., 1974), upon which latter case it purports to rely.

Though, as emphasized before, on the proof of this case, no one can say on what terms the money passed to petitioners, it is beyond peradventure that the so-called extortees admitted to bribery under the identical circumstances. If there was any evidence in this case, it was those admissions of bribery.

The Third Circuit in *United States* v. *Shelton,* 573 F.2d 917 (6th Cir., 1978) excluded the passive acceptance of a bribe as grounds for conviction of extortion "under color of official right" (573 F.2d at p. 921). An instruction directly reproduced from that case was refused here (Proposed Instruction A-3). In *United States* v. *Adcock,* 558 F.2d 379 (8th Cir., 1977), the trial court cautioned the jury that the defendant could not be convicted for bribery, and the Court of Appeals agreed that "Bribery . . . connotes a voluntary offer to obtain gain, where extortion connotes some form of coercion. Under the indictment defendant could not be convicted of bribery" (558 F.2d at p. 404).[9] Yet here that is exactly what was invited, what occurred, and what was condoned by the Seventh Circuit.

The jury was instructed:

> "Furthermore, that the transaction may also have constituted bribery is of no consequence in consider-

[9] The distinction was tendered as an instruction (Proposed Instructions A-5 & A-26), and refused.

ing whether extortion under color of official right was committed.

> "The same transaction may constitute bribery by the person paying the money and extortion under color of official right by the public official who receives it." (App. A, p. 17, fn 4)

Efforts toward qualification of that unfortunate quotation from *United States* v. *Staszcuk,* 502 F.2d 875 (7th Cir., 1974)[10] so as to accord with the Sixth and Eighth Circuits were repelled (Tr. 1361-1362).

Even the *Braasch* case is abused by this out-of-context quotation, as is made clear by Judge Campbell's concurring opinion, which was never disavowed by the Court:

> "That is not to say, however, that, as the government contends in the instant case, there is no distinction between the acceptance of a bribe by a public official and extortion under color of official right. For example, assume that a public official has been paid a sum of money to induce him to use his position and influence to obtain a building permit on behalf of an applicant who is clearly not entitled under the law to such a permit. In such a case, the money which the public official receives is not being paid to prevent the coercive use of his office, but rather to assist the payor in his efforts to obtain something to which he is not lawfully entitled. As the Court stated in United States v. Pranno, 385 F.2d 387, 390 (7th Cir. 1967) 'it might be solely a bribe and not extortion if the record showed that the issuance of the permit was illegal . . .' " (502 F.2d at p. 883).

If this record shows anything, it shows such pure bribery. If the Congress meant pure bribery to be the equiva-

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[10] We recognize *Staszuck* has been quoted frequently but as we pointed out (supra), in none of those cases including *Staszcuk* has conviction been founded on color of official right without inducement or the added charge of fear.

lent of extortion under color of official right, it could have said so. It uses the term "bribery", without embarrassment, as close as the next section (§1952). This Court, together with resolving the conflict, should exercise its supervisory power to preclude punishment for activities that Congress has not seen fit to make crimes.

6. The Court should grant Certiorari in this case because, in respect of the charges made under the Internal Revenue Code, the Fifth Amendment requirement that a person shall not be called upon to answer other than to a charge by the grand jury, and the Sixth Amendment requirement that an accused be advised of the nature and cause of the accusation against him were violated.

Three of your four Petitioners were charged (each in two counts) with making a false statement on his income tax return in that he, the individual petitioner, reported taxable income in [a stated amount] whereas he "then and there well knew and believed, his total income was substantially in excess of that sum." (Indictment Counts xiv through xix)

The only definition of "substantial understatement" in the Internal Revenue Code is found at Title 26 U.S.C. § 6501 (e)(1)(A), which requires that an understatement to be substantial must be at least 25% of the gross income reported. The three interested Petitioners asked the trial Court to instruct the jury of this sole Internal Revenue Code definition. In endorsing the trial Court's refusal to instruct as requested, the Court of Appeals gave as a primary basis that the statute "does not require that a false statement on an income tax return be substantial," but only that it be material (App. A, p. 20-21). Thus, it may be concluded that so long as the proof showed the accused had made *some* material misrepresentation (whether that which the grand jury charged or not), conviction, so long

as it was within the terms of the statute—as opposed to the term of the indictment—would be sustained and whether the proof showed the false statement consisted in a substantial understatement of income as the grand jury charged, was immaterial, because, under the statute, the false statement does not necessarily have to be an understatement of income. It could be many things: false employment; overstatement of deductions; overstatement of dependents; false capital bases, *ad infinitum,* but because it is *ad infinitum,* descent to particulars is an integral part of the charge, and failure to prove as the grand jury charged is destructive of Fifth Amendment guarantee; and conviction despite failure to prove as charged is violative of Sixth Amendment guarantee. The interpretation given by the Seventh Circuit rendering the grand jury specification as mere surplusage is inappropriate. The many ways this statute (26 U.S.C. § 7206(a)) is capable of violation negates the possibility of merely repeating the words of the statute to make a valid charge, since the statutory language fails to apprise a defendant "with reasonable certainty of the nature of the accusation against him." *Russell* v. *United States,* 369 U.S. 749, 765 (1962). Ignoring specifications as unnecessary has the same effect.

7. When the Congress has found it necessary to define in the Internal Revenue Code what constitutes "substantial omission" (25%) in the sense of civil vulnerability in the same context as proposed in this case involving potential criminal vulnerability, and has also found such definition necessary in a criminal context also involving a "substantial source of income" (50%), the Sixth Amendment requires in its mandate that a defendant be informed of the nature and cause of the accusation that, at least, the lesser of the two definitions be implied in the charge.

It is obvious from the gross disparity between what "substantial" means in respect of income under Title 26

U.S.C. §6501 (25%), and what it means in respect of Title 21 U.S.C. §849(e) (50%) that "substantial" in the context of income is a vague, elastic term. If definition is needed for guidance of the Courts and the Internal Revenue Service in the civil context, it is imperative in the criminal context, particularly when the sole definition of "substantial" in the same context is defined in the same Subtitle F of the Internal Revenue Code under which this prosecution was brought.

In implementation of a criminal statute that is not of itself of sufficient definiteness, (see Point 6 above), an indictment undefined as to its terms "might well violate the 'first essential of due process of law': It would forbid 'the doing of an act so vague that [persons] of common intelligence [would] necessarily have to guess at its meaning and differ as to its implications' [citing authority]." *United States* v. *Culbert*, 435 U.S. 371, 374 (1978)

In this case, taking the evidence in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60 (1942), and without the incursions made by cross-examination, the "substantial" understatements varied between 3.8% and an edge over 10%, but mostly in the area of 6 and 7%. (See App. A, p. 10)

The Court below endorsed the Trial Court's refusal to adopt the sole definition in the same sub-title of the same Internal Revenue Code saying merely that "appellant's [sic] reliance on Section 6501 (e) of the Internal Revenue Code, which defines substantial for purposes of civil liability as a misstatement in excess of twenty-five percent of the amount of the gross income reported on the return, is clearly misplaced in the context of a criminal prosecution under Section 7206(1)." (App. A, pages 20-21)

We submit that such a holding that admits the disparity is not sufficient to incur the least disadvantage civilly (extended statute of limitations), but approves the stamp of felon, makes mockery of the traditional code of American justice, and, the exercise of this Court's supervisory power to enforce the mandate of the Sixth Amendment that the "cause" of an accusation be related in understandable terms, but also that the value of freedom and reputation be not subordinated to the value of more modest monetary disadvantage in that traditional code.

8. The trial court's denial of Karnick's motion for severance from his co-defendants for trial amounted to an abuse of discretion under the circumstances. The situation materialized as defendant had anticipated, that is, he could not receive a fair jury trial joined to the co-defendants, not only for the "usual" reasons, but also because during trial, he constantly found himself at odds with his co-defendants. In this case, where defendant Karnick is named in only 2 of 19 counts, is the only defendant not charged with tax offenses, and where his co-defendants are charged in no less than 17 separate substantive counts—8 of which are Hobbs Act charges naming "extortees" with which defendant Karnick is not even alleged to have been connected—the totality of the circumstances was such that severance was required in the interest of justice, under F.R.Cr.P. 14.

Alternatively, joinder was improper from the outset under F.R.Cr.P. 8, and defendnt Karnick is entitled to a reversal, for the conspiracy count failed to encompass any of the counts 6 through 19, none of which named or otherwise involved him.

The Seventh Circuit's affirmance—grounded on Karnick's failure to have labelled his motion for severance as one under F.R.Cr.P. 8—misapprehends the prejudicial realities, overlooks persuasive authority for reversal, and ignores arguments concerning the jury's inability to compartmentalize its thinking and the differences, if not actual conflicts, between the tactics of the various defendants.

Defendant Karnick's motion for severance from his co-defendants for trial was denied. (Tr. 13)

The applicable Federal Rules with respect to joinder and severance, Rules 8 and 14, are set out at Appendix p. 43-44, *infra*. Rule 8 defines the outer limits of permissible joinder of offenses, while Rule 14 requires severance for trial even of offenses technically joinable under Rule 8 if joinder is prejudicial.

Despite our overwhelming arguments militating in favor of reversal on the severance question, the Seventh Circuit has affirmed on grounds defendant Karnick failed to *label* his motion for severance as having been made pursuant to Rule 8. (App. 29-30).

"BY ANY NAME . . ."

The Seventh Circuit first disposes of the mandatory-severance-due-to-misjoinder argument simply by noting that Karnick made no motion under Rule 8 prior to trial, thus precluding consideration of this aspect of the severance issue on review. (App. 29-30) The *label* on the Motion must not be deemed dispositive, where—as here—the *contents* of the motion, while framed under Rule 14 [Relief From Prejudicial Joinder—what could be more explicitly applicable?], clearly stated facts demonstrating that joinder was improper under Rule 8; for the Motion asserted, *inter alia*, that wholly unrelated (perjury and tax) offenses against the co-defendants were wrongly included.

In relying wholly on the label at the expense of the realities, the reviewing court has chosen to ignore cases to the effect that the contents, not the label, of a motion for severance should govern. For example, in *Wangrow* v. *United States,* 399 F.2d 106, 109-10 (8 Cir. 1968)—as at bar—the motion for severance specified Rule 14 only, but the supporting affidavit asserted both misjoinder and prejudicial joinder. There, the reviewing court reached the merits of the Rule 8 aspects of the motion, as the panel should have done here. Similarly, in *United States* v. *Marionneaux,* 514 F.2d 1244, 1248-49 (5 Cir. 1975), defendant's pre-trial motion for severance framed only in terms of Rule 8(a) was held to justify and require severance on the basis of Rule 8(b), despite the "wrong" characterization in the motion.

In short, the court chose to foreclose consideration of the substantial argument that joinder was initially improper on the inappropriate ground that Karnick mislabeled his motion.

* * *

Severance Under Rule 8

In the case at bar, the trial court's denial of Karnick's motion for severance was, under the circumstances, reversible error. In addition to the posture of the case just from the face of the indictment, as the situation developed at trial, defendant Karnick was extremely disadvantaged by being forced jointly to trial with other defendants, who additionally were charged with a total of 17 counts that did not even peripherally purport to involve him.

* * *

That each of counts 2 through 13 charges an alleged violation of the Hobbs Act does not in and of itself render

the offenses charged of "the same or similar character" within Rule 8(a).[11]

While the decision whether to grant severance under Rule 14 may be a matter of discretion, severance is *mandatory* where joinder is improper under Rule 8:

> "In other words, where multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact, and the trial judge has no discretion to deny relief." *United States* v. *Gougis*, 374 F. 2d 758, 762 (7 Cir. 1967), quoting from *Ingram* v. *United States*, 272 F.2d 567, 570 (4 Cir. 1959).[12]

In *Chubet* v. *United States*, 414 F. 2d 1018, 1020 (8 Cir. 1969), the reviewing court reversed one defendant's conviction because "there was no allegation linking the defendant with . . . [certain of the counts]. The information neither alleged that the transactions were connected nor that they were common to a conspiracy." Likewise, while a conspiracy is charged here, that conspiracy is alleged *only* to encompass payments from agents of the Danley Lumber Co., and thus counts 6 through 19 are *entirely* unconnected to Counts 1 through 5 so far as defendant Karnick is concerned. While the presence of a conspiracy count in some cases may provide the necessary nexus to obviate reversal under Rule 8 (improper joinder), here the specifically limited scope of the conspiracy must itself de-

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[11] See *United States* v. *Quinn*, 365 F.2d 256, 263-64 (7 Cir. 1966), where the Court held that two counts of banking law violations arising out of one set of circumstances were not properly joinable with two other counts of banking law violations under the same statutes as the first two but arising out of a different set of circumstances.

[12] *Accord, United States* v. *Spector*, 326 F.2d 345 (7 Cir. 1963); *Ward* v. *United States*, 289 F.2d 877, 878 (D.C. Cir. 1961).

fine the extent to which any of the other counts may properly be joined for trial.

In a similar factual situation, the Fifth Circuit in *United States* v. *Nettles*, 570 F. 2d 547 (1978), found improper joinder and reversed pursuant to Rule 8, holding:

> "There was no substantial identity of acts or participants . . . The involvement of the same police officers in each count does not provide the necessary relationship required by Rule 8(b)." *Id.* at 552.

An additional holding of *Nettles* is persuasive here, supporting the logic of our analysis of the *Chubet* case, *supra*. The Court in *Nettles* continues:

> "Where a substantive count is within the scope of a conspiracy charged then their joinder is proper. *See United States* v. *Gentile*, 495 F. 2d 626, 632 (5th Cir. 1974). That is the situation as to Counts One and Four, Counts Two and Five, and Counts Three and Six. However, there is no overlapping which would allow each of these groups to then be joined under Rule 8(b)." *Ibid.*

Here, under Rule 8, the Count 1 conspiracy charge could allow Counts 2 through 5 to be joined for a trial of all four defendants. And while we could concede that Karnick might conceivably have a fair trial with his co-defendants at a trial limited to Counts 1 through 5, joining that group of counts to any or all of the remaining counts (6 through 19) could *never* be proper.

In *United States* v. *Gentile*, 495 F. 2d 626 (4 Cir. 1974), the court reversed for improper joinder, holding:

> "While it is true that the alleged existence of a conspiracy will frequently permit joinder of offenses when it would otherwise be impermissible, . . . the conspiracy allegation in the instant case does not remedy the

discrepancy. *For a conspiracy to properly tie separate events together so as to permit joinder of defendants, the substantive offenses alleged in the indictment must fall within the scope of the conspiracy.*" *Id.* at 631-32. (Emphasis added.)

In both *Nettles* and *Gentile*, the reviewing court reversed because the substantive offenses—with which the co-defendants alone were charged—were not within the scope of the conspiracy charge, and the conspiracy charge was the only arguably connecting factor. Here, the same result should follow, where Count 1 charged all four defendants with extortion from Danley Lumber Co., Inc., but where each of the other charges in the count 6 through 19 group names a defendant other than Karnick in a count outside the scope of the conspiracy charge.

Rule 8 does not authorize the sweeping joinder of this indictment.

Severance Under Rule 14

"In deciding whether to grant a severance the trial court must balance the possible prejudice to the defendants against the government's interest in judicial economy. . . . ." *United States* v. *Crawford*, 581 F.2d 489, 491 (5 Cir. 1978), (reversing)

"If the appellate court is left with a definite and firm conviction that a defendant may have been prejudiced by the refusal to give him relief from joinder, it must reverse the conviction." *United States* v. *Johnson*, 478 F.2d 1129, 1134, n.8 (5 Cir. 1973), quoting 1 Wright, Federal Practice and Procedure, § 227 at 470 (1969).

"Under Rule 14 the trial court's duty to sever when prejudice appears continues throughout the trial." *United States* v. *Crawford, supra*, at 492; see *Schaffer* v. *United States*, 362 U.S. 511 (1960).

Aside from the mandatory Rule 8 factors pointed out above, severance should have been allowed at bar under Rule 14. Because he was forced to go to trial with his co-defendants upon the entire 19-count indictment, defendant Karnick was deprived of his right to have the jury impartially consider the singular question of his guilt or innocence. The unavoidable "spill-over" effect[13] of having the jury listen to evidence against the co-defendants which is not applicable to him[14] was increased, for the co-defendants also were charged with having made perjurious statements on their income tax returns during two separate tax years, while Karnick was charged only in Counts 1 and 4 with conspiracy and violation of the Hobbs Act.

Because only some 167 of 1279 pages of evidentiary trial material pertained to Karnick, and because he is charged only in 2 of 19 counts, Karnick's situation is comparable to and should be governed by principles stated in an unwavering line of cases specifically dealing with prejudice due to joinder where there is great disparity of the volume

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[13] *Cf. United States* v. *Johnson*, 515 F.2d 730 (7 Cir. 1975), and see especially (partially) dissenting opinion of Judge Swygert, *id.* at 736-41.

[14] Defense counsel for Karnick renewed the motion for severance and for mistrial when evidence was admitted against co-defendants which did not pertain to him. See, *e.g.*, Tr. 130, 396, 553, 556.

The Seventh Circuit has recognized (and, so understanding, has reversed, even in a *bench* trial):

> "Where a number of defendants are tried together and evidence is received as to some but not as to the others, it usually is quite difficult for a trial judge to recall at the end of the trial just what evidence was used as against each of the defendants." *United States* v. *Turnipseed*, 272 F.2d 106, 107-08 (7 Cir. 1959).

and weight of the evidence against the moving defendant as compared with that against the others.[15]

Determining Prejudice

Defendant Karnick has argued in the trial and in the reviewing court that the evidence is insufficient, as a matter of law, to support his conviction. In the alternative, even if the evidence be deemed technically "sufficient," clearly it was "not so overwhelming" that the extreme bulk of additional evidence against his co-defendants did not "tip the scales" against Karnick.[16]

* * *

It is highly unlikely that Karnick was not prejudiced by jointly being tried with the other defendants and with the unrelated counts. For example, even government counsel has confounded portions of the evidence and applied it in violation of the court's admonition, in arguing to the reviewing court that certain testimony of Bentley Weitzman is the basis for inferences of fact necessary to convict defendant, although the trial court had limited such evidence and ordered that it not be used against defendant. (Tr. 131; G. Br. p. 28.) How, then, can the jury be expected properly to consider the evidence against the specific defendants, as directed by the court?

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[15] See *United States* v. *Kelly*, 349 F.2d 720, 759 (2 Cir. 1965); *United States* v. *Mardian*, 546 F.2d 973, 977 (D.C. Cir. 1976); *United States* v. *Wasson*, 568 F.2d 1214, 1223 (5 Cir. 1978).

In *United States* v. *Donaway*, 447 F.2d 940 (9 Cir. 1971), less than 50 pages of the government's 2,300 page case in chief pertained to defendant. The reviewing court agreed that severance should have been granted, stating:

> "We find it impossible to conclude on the fact here that appellant was not severly prejudiced by the evidence relevant only to the co-defendants." *Id.* at 943.

[16] See *United States* v. *Wasson*, 568 F.2d 1214, 1223 (5 Cir. 1978) (quotation reproduced at p. 38, *infra*).

The disparity of evidence against the various defendants militates against a finding that the jury was able to follow the court's limiting instructions. In an analogous situation, one reviewing court, reversing, has remarked:

> "... we cannot presume that the jury adhered to limiting instructions and properly 'segregate[d] [the] evidence into separate intellectual boxes,' *Bruton* v. *United States,* 381 U.S. 123, 131 . . . (1967) . . ." *United States* v. *Foutz,* 540 F.2d 733, 738 (4 Cir. 1976).

* * *

"GUILT BY ASSOCIATION . . ."

The Seventh Circuit has ignored the extent of the evidentiary disproportion, considering, as is evident from the panel's statement, that Karnick's position was merely "that since he was charged in only two of the nineteen counts in the indictment, he was prejudiced by the disparity between the evidence against him and the evidence against his co-defendants." (App. 31) That is far from a fair statement of defendant Karnick's position as to the Rule 14 severance issue; for, in addition to the 2 versus 19 count situation, only some 167 of 1279 pages of evidentiary trial material pertained to Karnick. Relying solely on *United States* v. *Grabiec,* 563 F.2d 313 (7 Cir. 1977), (App. 31), the reviewing court ignored the factual realities at bar, and also refused to consider the applicable holdings, considering the factual framework, in such cases as *United States* v. *Kelly,* 349 F.2d 720 (2 Cir. 1965); *United States* v. *Mardian,* 546 F.2d 973, 977 (D.C. Cir. 1976); *United States* v. *Donaway,* 447 F.2d 940, 943 (9 Cir. 1971); and *United States* v. *Wasson,* 568 F.2d 1214, 1223 (5 Cir. 1978), all reversing for failure to grant Rule 14 severance.

The mere "sufficiency" of the evidence, as perceived by the reviewing court, is not adequate reason for denying the validity of an otherwise persuasive motion for severance under Rule 14; for, as astutely noted by the *Wasson* court:

> "Although the evidence was sufficient to support the verdict . . . , it was not so overwhelming that the obvious guilt of Kennedy did not tip the scales against Littrell." *Id.* at 1223.

So, too, at bar.

"ANTAGONISTIC DEFENSE TACTICS . . ."

The reviewing court has ignored Karnick's arguments: (i) that he was prejudiced by his co-defendants' insistence on a "no inference from failure to testify" instruction; *United States* v. *De Luna*, 308 F.2d 140 (5 Cir. 1962); and (ii) that the government characterized certain prejudicial argument as "invited response" to an argument by a co-defendant.

Indeed, the panel swallowed whole the government's position *re* invited reply, excusing the comment complained of as "invited response," while conveniently not specifying which defendant did the inviting. In fact, it was counsel for a co-defendant, not counsel for Karnick.[17]

As the trial progressed, defendant Karnick had the additional and onerous disadvantage of being "at odds" with his co-defendants. Frequently, his co-defendants would take a position contrary to his on many "trial

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[17] See App. 28, where the court condones the prosecutor's comments as "invited response" without specification as to at whose invitation. As noted by defendant Karnick, who claimed prejudice due to such argument, it was a *co-defendant's counsel* who invited the response, *not counsel for defendant Karnick.*

strategy'' decisions. Faced with varying defense motions and requests, the trial court more often than not sided with the majority, and Karnick had to tolerate judicial decisions and situations which simply would not have arisen, had his initial motion for severance been allowed. For example, the co-defendants wanted a ''no inference from failure to testify'' instruction, and although Karnick did not want such an instruction, he was forced to have the jury so advised[18] (Tr. 1346) Persual of the conference on instructions and of the closing arguments illustrates in microcosm how unfairly this scenario unfolded. (See, *i.e.*, Tr. 1386-7, 1389)

While this is not quite what one properly could call a case of ''antagonistic defenses'' in the classic sense, these repeated disadvantages, considered in the light of the extreme disproportion of the evidence against Karnick as compared with that against the co-defendants, rendered it highly unlikely that Karnick could receive that fair trial to which he is constitutionally entitled.

While these factors alone might not suffice to require a Rule 14 severance, considered together with all the foregoing, they emphasize and magnify the prejudice suffered here by defendant Karnick, serving to remove this cause from the rule of the sole (*Grabiec*)[19] case relied on by the Seventh Circuit.

* * *

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[18] *Query:* Does not the giving of such an instruction over objection—at least theoretically—amount to constitutionally forbidden comment on failure to testify, since *it calls attention to defendant's silence*, if (by his objection) he is willing to waive the instruction, which is, after all, supposed to protect the defendant?

If a defendant has a right to such an instruction, he must also have a right to give up that right.

See *United States* v. *DeLuna*, 308 F.2d 140 (5 Cir. 1962).

[19] See App. 31; *United States* v. *Grabiec*, 563 F.2d 313 (7 Cir. 1977).

Utilizing its supervisory powers, this Court should grant certiorari so as to clarify the applicable standards under F.R.Cr.P. 8 & 14 for determining whether a motion for severance should be allowed, with particular emphasis on whether a technically correct label is essential, and what criteria are involved where a "disparity of the evidence" argument is raised.

CONCLUSION

Wherefore for the above and foregoing reasons, it is respectfully prayed that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 78-2617, 78-2618, 78-2619 and 78-2654

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN HEDMAN, MICHAEL JERCICH, THOMAS KARNICK and HENRY LARSEN,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78 CR 394—Nicholas J. Bua, *Judge.*

Argued September 24, 1979—Decided August 29, 1980

Before SWYGERT, PELL, and BAUER, *Circuit Judges.*

BAUER, *Circuit Judge.* Defendants-appellants in these consolidated cases appeal from the judgments of conviction entered upon the jury verdicts finding them guilty of conspiracy to commit extortion and extortion under color of official right in violation of the Hobbs Act. Appellants also appeal from their convictions for filing

fraudulent tax returns in violation of the federal income tax laws. We affirm.

I. *FACTS*

On June 13, 1978, the federal grand jury returned a nineteen count indictment charging the defendants, John Hedman, Michael Jercich, Thomas Karnick and Henry Larsen; with various violations of federal statutes arising from the acceptance of monies allegedly extorted by them in their capacities as Building Inspection Supervisors assigned to the Construction and Technical Inspection Bureau of the City of Chicago. Count One of the indictment charged all four defendants with conspiracy to commit extortion through the wrongful use of their official positions, in violation of 18 U.S.C. § 1951.[1] Counts Two

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[1] The Hobbs Act provides, in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physicial violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

18 U.S.C. §§ 1951 (a)-(b)(2), (3).

through Thirteen of the indictment charged the defendants individually with substantive violations of Section 1951 by the extortion of money from various building contractors under color of official right. Counts Fourteen through Nineteen charged defendants Hedman, Jercich and Larsen with the failure to report the income received from these extortionate activities on their federal income tax returns for the years 1973 and 1974, in violation of 26 U.S.C. § 7206(1).

All four defendants were tried jointly before a jury with the Honorable Nicholas J. Bua presiding. On November 15, 1978, at the conclusion of a two week trial, the jury returned guilty verdicts against each defendant on all counts of the indictment, with the exception that Michael Jercich was found not guilty in Count Twelve. On December 19, 1978, Judge Bua sentenced defendants Hedman, Jercich and Larsen each to one year in the custody of the Attorney General, three years' probation, and imposed a $5,000 fine. Thomas Karnick was sentenced to one year of custody on a work-release program, three years' probation, and received a $1,000 fine.

In view of the numerous claims of error asserted on appeal, and because many of the contentions raised concern the quality and sufficiency of the evidence, a summary recitation of the evidence adduced at trial is warranted. Other pertinent factual material necessary to an understanding of our resolution of these claims is appropriately set forth in the discussion that follows.

The evidence at trial showed that the defendants commenced their employment with the City of Chicago during the 1950's as inspectors for the Department of Buildings. In 1969 and 1970, they were promoted to the positions of Supervisor. In those positions, the defendants were responsible for supervising the inspection, by six

district inspectors, of all new construction and remodeling in the geographical areas of the City of Chicago to which they had been assigned. The Chicago Building Code requires that anyone who undertakes any construction work, structural repairs, additions or remodeling in the city, secure a building permit from the Department of Buildings. The fee for such permits varies with the type of construction undertaken. For example, the permit fee for a frame garage was $24 in 1971 and $47.50 in 1976. Once the permit is obtained, the construction may proceed. At various stages of the construction a building inspector from the City of Chicago inspects the project to insure compliance with the building code. Upon completion of the construction, the inspector validates the permit.

A. *Counts One through Five*

These counts alleged the receipt of extortionate payments by the defendants from the Danley Lumber Company, an Illinois corporation whose principal business is the construction of residential garages. In the course of its business, Danley annually purchases approximately $1,000,000 in building materials from manufacturers outside the State of Illinois.

Since its inception in 1959, Danley has constructed a substantial number of garages in Chicago that violated the Building Code, usually because the garages were too large or too close to the lot line. On such occasions, Danley would either fail to obtain a building permit or obtain one through the submission of a false application. For these jobs, Danley would make illegal payoffs to the defendants.

Between 1959 and the mid-1960's, Bentley Weitzman, the President of Danley, would pay $25 to the building inspector for the district in which the non-conforming

garage was being erected. The money for these payoffs was obtained from the receipts for construction work that was performed but not recorded on Danley's books. Weitzman testified that these receipts were also not reported on Danley's tax returns. From the mid-1960's until 1976, the task of making payoffs on construction that violated the Chicago Building Code was handled by Bentley Weitzman's father, Harry Weitzman. When a job did not violate the building code, Harry Weitzman would file a permit application and pay the required fee to the City of Chicago.

A routine procedure was established at Danley for processing non-conforming garages. When a job violated the Building Code, the employee at Danley who processed that job order would give Harry Weitzman a slip of paper indicating the address of the job and a notation that a violation existed. Weitzman would then write the name of the area supervisor for that job on the slip, and return the slip to the job file. At the same time, Weitzman would make an entry on a list he maintained of all non-conforming jobs. When the garage was being built, the slip would be returned to Weitzman. He accumulated slips for several days and then gave them to Irving Lazarus, Vice President of Danley. Lazarus would obtain cash from a walk-in safe located in Danley's offices, place $25 per slip in an envelope with the slips, and give the money and slips to Weitzman. Bentley Weitzman testified that, on occasion, he also provided the cash to his father.

When Harry Weitzman received the cash and slips from Lazarus, he would delete the job addresses from his list. He would then write the name of the supervisors on separate envelopes, place the appropriate amount of money in each envelope, and personally deliver them to all four defendants at either their offices in City Hall or their homes. On occasion, Weitzman would give to one supervisor an envelope to be delivered to another supervisor.

From 1968 or 1969 until 1976, Harry Weitzman kept a diary of these payoffs. At the top of each page of the notebook, Weitzman wrote the first name of a supervisor, e.g., "Mike," "Tom," "Hank," and "John." Also listed on these pages were the addresses of the nonconforming job sites, as well as the amounts, the dates, and the places of the payments made to each supervisor for those jobs. The diary detailed payments that were made to all four defendants individually, as well as payments that were made to one supervisor for delivery to another.

B. *Counts Six through Eight*

These counts related to the extortionate payments allegedly received by Hedman, Jercich and Larsen from the All State Lumber Company. All State is an Illinois corporation engaged in the construction of garages and obtains building materials from manufacturers and suppliers located outside of Illinois.

Like the Danley Lumber Company, All State built garages that violated the Chicago Building Code. On such occasions, All State would not obtain a building permit, but would instead make a payoff to the Building Inspection Supervisor assigned to the district in which the garage was constructed.

When All State commenced a job that violated the Building Code, either the garage superintendent or the remodeling superintendent would telephone the appropriate supervisor and give him the address of the non-conforming job site. The All State employee would then give a slip of paper to the assistant bookkeeper, indicating the job name, the address, the supervisor, and the amount of money to be paid to the supervisor. The bookeeper would then write the name and address of the job on a separate

piece of paper and place it, along with $25, into an envelope bearing the supervisor's name. The envelope often contained several job slips and amounts of money ranging from $25 to $100. The supervisors would then stop by the All State office and pick up the envelopes bearing their names. Three of the defendants, John Hedman, Michael Jercich, and Henry Larsen, received payoffs in this fashion from All State. On occasion, one supervisor would pick up the envelopes addressed to another supervisor.

The money used for the payoffs was obtained from the All State petty cash fund and was recorded on All State's books as a "permit fee." Thus, each entry in the All State accounts of $25 for a "permit" reflected a payoff. By comparing the assignment maps of the Department of Buildings to the address of each payoff, it was possible to approximate the amount of money paid to each of the three supervisors. Between 1971 and 1974, approximately $11,575 was paid collectively to the supervisors by the All State Lumber Company.

C. *Counts Nine and Ten*

These counts related to payoffs allegedly made to defendants Hedman and Jercich by the Ashland Building and Improvement Company, a firm engaged in general repair work and specializing in porch construction. Ashland purchased building materials and supplies from Lee Lumber, which acquired these materials from out of state manufacturers.

On a number of occasions, Ashland would start a job before a permit was obtained or complete a job in violation of the Building Code and fail to secure a permit. For these jobs, Ashland would pay money to Building Inspection Supervisors for the City of Chicago who were in charge of inspection for the districts where the non-

conforming jobs were located. Frank Spatz, the President of Ashland, would either telephone the appropriate supervisor at his home or at City Hall, or the supervisor would visit Ashland's corporate offices. Spatz would inform the supervisor of the job violation and its location. After talking with Spatz, the supervisor would stop by Ashland's offices and receive the payoff from Spatz, or if Spatz was not in the office at the time, the money would be left in an envelope for the supervisor to pick up. Payments to the supervisors would be made either in cash or by a check. Ashland checks were written to both John Hedman and Michael Jercich in the amounts of $100 each. In several instances, Michael Jercich directed that the checks issued to him be made payable to other payees.

Spatz maintained a written record of the payoffs that were owed, and after a payment was made he destroyed the record. The source of the funds for the payoffs was Spatz's personal salary and expense account at Ashland. When a payoff was to be made, Spatz would withdraw the amount to be paid in cash from an envelope kept in a safe at Ashland's offices or direct his secretary to prepare a check in the appropriate amount. A job order number was inscribed on each check to indicate the job for which the payment had been made, and the checks were recorded on Ashland's books as "finder's fees." Spatz would then place the money in a drawer in his office before paying the supervisors or would give it to his secretary for delivery in his absence.

D. *Counts Eleven and Twelve*

These counts involved payoffs allegedly made to defendants Hedman and Jercich by Airoom, Inc. Airoom is a construction company that specializes in building room additions in Chicago and its suburbs. Airoom purchased

lumber for its construction projects from Rubenstein Lumber, which in turn purchased all of its lumber from suppliers outside of Illinois.

Airoom would sometimes begin construction in Chicago before a building permit was obtained, or would perform the work without ever obtaining a permit. On these occasions, the construction superintendents of Airoom were authorized to make payoffs to building inspectors. Burton Klein, President and owner of Airoom, testified that he would telephone defendant Hedman and provide him with the name and address of the non-permit job. Hedman would then telephone Klein to arrange a meeting at either Airoom's offices or at a restaurant. At these meetings, Klein would pay Hedman in cash from his Airoom salary. Klein paid Hedman for approximately ten jobs built by Airoom in Chicago. The payment was usually $25 for a job commenced without a permit and $50 for a job completed without a permit. Finally, Klein testified that he met with defendants Hedman and Jercich in late 1975, and that Hedman advised him to destroy any records that might relate to jobs for which payoffs had been made.

E. *Count Thirteen*

This count relates to payoffs allegedly made to John Hedman by Solar Construction Company. Solar, which builds garages and room additions in Chicago and the surrounding suburbs, acquired its building materials from the Maher Lumber and Hardware Company of Illinois. Maher in turn purchased all of its building materials and supplies from businesses located outside of Illinois.

Between 1972 and 1974 Solar completed approximately sixty-five jobs in Chicago without obtaining building permits. On other occasions, Solar would obtain a building permit but construct a garage that did not conform to

the permit. In either of these cases, Robert Pareti, owner of Solar, would telephone Hedman at City Hall or at his home to advise him of the deficiency. In most instances, Hedman would give his consent over the telephone and Pareti would make a notation on the job file. Pareti would then arrange for a Solar check payable to a fictitious payee or to "cash" to be sent to Hedman's residence. These payoffs were recorded on Solar's books as "permit" expenses.

F. *Counts Fourteen through Nineteen*

These counts charged defendants Hedman, Jercich and Larsen with the failure to report the payoffs received from the above contractors on their federal income tax returns for 1973 and 1974.

John Hedman filed a federal income tax return for 1973 in which he stated that his income was $16,426. In his 1974 tax return, Hedman stated that his income was $19,214. On both returns, Hedman listed as his sources of income wages and mileage reimbursements from the City of Chicago, interest income, and an income tax refund from the State of Illinois. He did not report as income the approximately $1,125 in payoffs he received in 1973 and the approximately $1,575 received in 1974.

Henry Larsen stated on his 1973 and 1974 federal income tax returns that his income was $18,703 and $20,977.63, respectively. He did not report $1,125 received as payoffs in 1973 or the $800 he received in 1974.

Similarly, Michael Jercich failed to include as income the payoffs he received for 1973 and 1974. His adjusted gross income for 1973 was reported as being $18,087.72, which did not include $1,925 received as payoffs. His adjusted gross income for 1974 was $17,343.45, which did not include $1,850 he received in payoffs during that year.

II. *SUFFICIENCY OF THE EVIDENCE*

In their first principal argument on appeal, appellants contend the evidence adduced at trial was insufficient to sustain the jury's verdicts. We conclude that the evidence cited above, viewed in the light most favorable to the government, clearly supports the jury's findings. *United States* v. *Guevara,* 598 F.2d 1094, 1096 (7th Cir. 1979).

A. *Conspiracy*

Appellants argue the evidence was insufficient to permit a finding that they were guilty of conspiracy to commit extortion, as charged in Count One of the indictment. A conspiracy consists of a combination or confederation between two or more persons formed for the purpose of committing, by their joint efforts, a criminal act. An agreement is the primary element of a conspiracy, but a formal agreement need not be demonstrated. *United States* v. *Varelli,* 407 F.2d 735 (7th Cir. 1969). Although proof of knowledge on the part of the participant in the conspiracy is also an essential element of the offense, circumstantial evidence is sufficient to connect an alleged co-conspirator with the conspiracy. *United States* v. *Page,* 580 F.2d 916 (7th Cir. 1978).

Applying these principles to the evidence of conspiracy adduced at trial, it is clear that the government presented sufficient evidence to sustain the jury's verdict. Count One related to extortionate payments made by Danley Lumber Company to all four defendants. The evidence showed that from approximately 1968 until 1973, the defendants were the only area supervisors in the New Construction Bureau of the Department of Buildings. During that period of time, each defendant received illegal payoffs from Danley in the same amount, in the same manner, for the

same reason, and from the same individual, Harry Weitzman. It was further established that on over 80 occasions, one of the defendants would accept illegal payments on behalf of the other defendants. All four defendants therefore acted as conduits for the others. Moreover, on such occasions, the conduit would also receive an illegal payment thereby negating the hypothesis that the conduit did not know the contents of the envelopes destined for others. Weitzman's payment procedure involved advising a defendant of the address to which a payment related and the address for which the defendant would be paid in the future. Thus, from Weitzman's testimony that, with one exception, no defendant ever complained of not receiving a payment, the jury could infer that each conduit payment was completed.

Accordingly, the evidence established the elements of conspiracy to commit extortion under "color of official right" by showing a joint venture to obtain illegal payments through the use of the defendants' official positions.

B. *Interstate Commerce*

Appellants also contend that the evidence failed to prove the requisite effect on interstate commerce under the Hobbs Act. The government relied on the "depletion of assets" theory to establish that element at trial. Under this theory, commerce is affected when "an enterprise, which either is actively engaged in interstate commerce or customarily purchases items in interstate commerce, has its assets depleted through extortion, thereby curtailing the victim's potential as a purchaser of such goods." *United States* v. *Elders*, 569 F.2d 1020, 1025 (7th Cir. 1978). We conclude that the evidence was sufficient to establish the jurisdictional nexus between the extortionate conduct and interstate commerce.

Appellants first argue that because the net long-term effect of the extortionate payments was to increase the assets of the companies involved, there was no depletion of assets shown. This argument ignores the fact that Hobbs Act convictions sustained under this theory involved payments to obtain a financial benefit or to avoid a financial loss. *See, e.g., United States* v. *Craig,* 573 F.2d 513 (7th Cir. 1978); *United States* v. *DeMet,* 486 F.2d 816 (7th Cir. 1973), *cert. denied,* 416 U S. 969 (1974). The focus of the "depletion of assets" theory is the payment itself. If that money is derived from a source which otherwise could be devoted to the purchase of interstate materials, the law presumes a potential effect on commerce sufficient to satisfy that element of the offense. *United States* v. *Elders, supra* at 1024.

Appellants further argue that the depletion of assets theory was not proved by the government's evidence. We disagree. The evidence showed that each of the companies which made payments to the defendants purchased building materials which were manufactured outside of Illinois. Danley Lumber Company purchased approximately one million dollars worth of various building materials, including lumber, garage doors and siding, each year. Similarly, All State Lumber Company purchased thousands of dollars worth of various building materials from manufacturers outside of Illinois. Ashland Building and Supply Company acquired lumber, doors and windows from Lee Lumber, which acquired these materials from suppliers outside of Illinois. Rubenstein Lumber supplied Airoom, Inc. with building materials which were not manufactured in Illinois. Finally, the evidence showed that Solar Construction Company acquired certain of its building materials from the Maher Lumber and Hardware Company, whose suppliers were also located outside of Illinois during the time period alleged in the indictment.

Evidence was also presented by the government which showed that the extortionate payments were made either directly or indirectly with company funds which could otherwise have been used to purchase interstate building materials. Danley Lumber Company made payments to all four defendants. Bentley Weitzman, the President of Danley, testified that the monies paid to the defendants on the occasions that he provided payoff money were from corporate funds obtained from Danley's unreported gross receipts. All of the payoffs charged in the indictment were made by his father, Harry Weitzman, who testified that most of the payoff monies were given to him by Irving Lazarus, the Vice President of Danley. The evidence showed that the funds Lazarus provided Harry Weitzman came from a walk-in safe located at Danley's corporate offices. The fact that the money was kept in Danley's safe, together with the testimony of Bentley Weitzman that whenever he provided payoff money it was from corporate funds, was sufficient for the jury to infer that the money taken from the safe was also Danley's money.[2]

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[2] Appellant Karnick argues in his reply brief that the evidence failed to show that the payments he allegedly received were from Danley's corporate funds because the trial court specifically instructed the jury not to consider the testimony of Bentley Weitzman as evidence in the case against Karnick. Tr. at 131. However, Betty Jan Mack, who was employed as the office manager and secretary for Danley, testified that between 1972 and 1975 she observed Irving Lazarus remove cash from the walk-in safe, place the cash in an envelope, and give it to Harry Weitzman approximately once a week. Thus, independent of Bentley Weitzman's testimony, this evidence was sufficient to enable the jury to conclude that the monies taken from the safe by Lazarus were corporate funds used for business purposes.

The evidence as to the source of funds used by the other companies showed that All State Lumber Company's assistant bookkeeper, Marci Pugno, would use money taken from All State's petty cash fund to make payoffs to Hedman, Jercich and Larsen. Payments from Ashland Building and Improvement Company were made either by Ashland checks or with cash taken from Ashland's safe and charged to the personal salary and expense account of Frank Spatz, the sole owner of Ashland. Airoom, Inc. payments to the defendants were made in cash by its President and owner, Burton Klein, from the salary he received from Airoom. Solar Construction Company's payments were made by checks drawn against Solar's account, and these payments were recorded in Solar's cash disbursement journals and job ledgers.

Thus, from the evidence indicating that each construction company purchased building materials manufactured outside of Illinois and the evidence indicating that the money used for the extortionate payments came either directly or indirectly from the assets of these companies, the jury properly could have concluded that commerce had been affected under the depletion of assets theory because there was a "realistic probability" that these monies would have been used to purchase materials that were part of interstate commerce. *United States* v. *Staszcuk*, 517 F.2d 53, 60 (7th Cir.) (*en banc*), *cert. denied*, 423 U.S. 837 (1975).

C. *Extortion*

Finally, the appellants contend the government's proof of extortion was defective because the evidence failed to show that the monies received by appellant Hedman were monies that were "not due them" as alleged in the indictment. Burton Klein, president and sole shareholder of

Airoom, Inc. testified that $25 would be paid to Hedman on jobs that were commenced without a permit and $50 would be paid on jobs that were completed without a permit. No testimony was elicited on either direct or cross-examination that the money was owed to Hedman, the Department of Buildings, or the City of Chicago. In the absence of such evidence, together with the fact that the money was paid only when construction was started before a permit was obtained or when no permit was obtained, the jury could have reasonably found that the money was not lawfully due Hedman or the City of Chicago.

Appellants urge a similar contention with regard to the monies paid to Hedman by Solar Construction Company. The evidence showed that Robert Pareti, the owner of Solar, paid Hedman $25 when a job was to be done without a permit. Absent testimony or other evidence to the contrary, the jury was entitled to conclude that the money was not lawfully owed to Hedman, the Department of Buildings, or the City of Chicago.

We also find no merit in the contention that extortion was not shown regarding the All State Lumber Company because its owner, Frank Spatz, was "happy" to make the payments. As this Court observed in *United States* v. *DeMet,* 486 F.2d 816 (7th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974): "The fact that relations between the victims and the extorters were often corial is not inconsistent with extortion." *Id.* at 820 (citation omitted).

We therefore conclude that the evidence adduced at trial, viewed in the light most favorable to the government, was sufficient to establish each element of each count of the indictment beyond a reasonable doubt.

III. *JURY INSTRUCTIONS*

In their second principal argument on appeal, the appellants contend that the trial court erred in certain of its instructions to the jury. We find the arguments advanced in support of this contention to be without merit.

A. *Color of Official Right*

Appellants Hedman, Jercich and Larsen argue that the jury was improperly instructed on the elements of extortion "under color of official right."[3] Specifically, the appellants claim that it was error to refuse their tendered instructions which in substance would have required the government to show that the appellants were the "initiators" or "inducers" of the alleged payments and that the payors were not seeking that to which they were not entitled.[4] Absent these elements, the appellants contend that bribery rather than extortion was established and

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[3] Appellant Karnick raises an analogous argument that the evidence adduced at trial was insufficient to sustain his conviction under the Hobbs Act because the government failed to establish those same elements which the defendants were unable to present to the jury through their tendered and refused instructions.

[4] The trial court instructed the jury as follows:

> The jury is further instructed that extortion under color of official right means the obtaining of money by a public official through wrongful use of his office when the money obtained was not lawfully due and owing to him or to the office which the public official represented.
>
> It does not matter whether the public official induces the payment to perform his duties or not to perform his duties. Extortion under color of official right does not require proof of specific acts by the public officials demonstrating force, threats, or the use of fear so long as the victim consented because of the office or position held by the official who obtained the

(footnote continued)

that accordingly, the government failed to prove a violation of the Hobbs Act.

It is settled law in this Circuit as well as others[5] that in a Hobbs Act prosecution for extortion under color of official right it is unnecessary to show that the defendant induced the extortionate payment or that the payor was entitled to the benefit obtained from such payment. The government is merely required to prove that a public official obtained money to which he was not entitled and which he obtained only because of his official position. As this Court stated in *United States* v. *Braasch*, 505 F.2d 139 (7th Cir. 1974):

(footnote continued)

money.

If the public official knows the motivation of the victim focuses on the public official's office and money is obtained by the public official which was not lawfully due and owing to him or the office he represented, that is sufficient to satisfy the requirements of the law of extortion under color of official right.

The mere voluntary payment of money would not constitute extortion.

Furthermore, that the transaction may also have constituted bribery is of no consequence in considering whether extortion under color of official right was committed.

The same transaction may constitute bribery by the person paying the money and extortion under color of official right by the public official who receives it.

Tr. at 1568-69.

[5] *See United States* v. *Harding*, 563 F.2d 299, 305, 307 (6th Cir. 1977); *United States* v. *Hathaway*, 534 F.2d 386, 393 (1st Cir. 1976); *United States* v. *Brown*, 540 F.2d 364, 372 (8th Cir. 1976); *United States* v. *Hall*, 536 F.2d 313, 321 (10th Cir. 1976); *United States* v. *Price*, 507 F.2d 1349, 1350 (4th Cir. 1974) (*per curiam*); *United States* v. *Mazzei*, 521 F.2d 639, 643 (3d Cir. 1975); *United States* v. *Trotta*, 525 F.2d 1096, 1098-1099 (2d Cir. 1975).

> Appellants, however, overlook the fact that the evidence shows that the conspirators used the power and authority vested in them by reason of their office to obtain money not due them or due the office. The use of office to obtain payments is the crux of the statutory requirement of "under color of official right", and appellants' wrongful use of official power was obviously the basis of this extortion. *See United States* v. *Staszcuk*, 502 F.2d 875 (7th Cir. 1974). It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. That such conduct may also constitute "classic bribery" is not a relevant consideration.

Id. at 148. *See United States* v. *Kuta*, 518 F.2d 947, 950 (7th Cir.), *cert. denied*, 423 U.S. 1014 (1975); *United States* v. *Crowley*, 504 F.2d 992, 995 (7th Cir. 1974); *United States* v. *Gill*, 490 F.2d 233 (7th Cir. 1973).

Since the instruction given by the court in this case complied with this standard, we find no error.

B. *Interstate Commerce*

Appellants next argue that the trial court improperly instructed the jury on the element of the effect on interstate commerce required under the Hobbs Act. The appellants contend, and their instructions rejected by the court stated, that the government was required to prove an *adverse* effect on commerce. Neither the literal language of the statute nor the case law supports this contention.

It has been held that the Hobbs Act prohibits interference with commerce "in any way or degree," *United States* v. *Stirone,* 361 U.S. 212 (1960), and that it "should be given an expansive interpretation to cover a wide range of extortionate activity." *United States* v. *Elders,* 569 F.2d 1020, 1025 (7th Cir. 1978). Thus, this Court has found the commerce element to be satisfied where the actual impact on commerce is *de minimis, United States* v. *Crowley, supra,* or where, in the absence of proof of an actual impact, there is a realistic probability that the extortionate transaction will have some effect on interstate commerce. *United States* v. *Blakey,* 607 F.2d 779, 783 (7th Cir. 1979). Moreover, evidence establishing a positive or beneficial impact on commerce has been held to be sufficient to sustain federal jurisdiction under the Hobbs Act. *United States* v. *Staszcuk, supra* at 878; *United States* v. *Kuta, supra* at 950-951. Accordingly, the appellants were not entitled to an instruction requiring the jury to find that the extortionate conduct charged in the indictment constituted an adverse effect on interstate commerce.

C. *Tax Evasion*

Finally, the appellants argue that the trial court improperly instructed the jury on the law concerning the income tax counts charged in the indictment. We find no error.

The indictment alleged that appellants Hedman, Jercich and Larsen made materially false statements on their federal income tax returns for 1973 and 1974 by substantially understating their incomes for those tax years, in violation of 26 U.S.C. § 7206(1). The appellants of-

fered an instruction which defined the term "substantial" as meaning a misstatement of gross income in excess of twenty-five percent of the amount of gross income reported on the tax return. The trial court refused the instruction on the ground that the question of what constitutes a substantial misstatement is a question of fact for the jury to decide.[6]

Section 7206(1) does not require that a false statement on an income tax return be substantial; it merely requires

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[6] The trial court instructed the jury as follows:

> To convict a defendant, the government must prove each of the following three elements beyond a reasonable doubt:
>
> 1. the willful making and subscribing of a return filed with the Internal Revenue Service that was incorrect as to a material matter.
>
> 2. that the return contained a written declaration that it was made under the penalty of perjury; and
>
> 3. that the defendant did not believe the return to be true and correct as to the material matter charged in the indictment.
>
> The jury is further instructed that each of the tax counts alleges that the particular defendant received substantial other income in addition to the total income reported on the return. It is not necessary for the government to prove the exact amount of the additional income. It is sufficient if the government proves beyond a reasonable doubt that the defendant had income substantially in excess of the total income he reported on his return.
>
> The false statement alleged in each of the tax counts is that the total income reported on the return involved did not contain substantial other income purportedly received by the particular defendant. The Court instructs you that a statement of total income on a tax return is material as a matter of law.

Tr. at 1572-1573.

that the misstatement be material.[7] This Court has previously held that false statements relating to gross income, irrespective of the amount, constitute a material misstatement in violation of Section 7206(1). *United States* v. *Clavey,* 578 F.2d 1219 (7th Cir. 1978) (*en banc*) (adopting by reference the panel opinion at 565 F.2d 111 (7th Cir. 1977) on this point); *see also United States* v. *Di Varco,* 484 F.2d 670, 673 (7th Cir. 1973), *cert. denied,* 415 U.S. 916 (1974). Moreover, appellant's reliance on Section 6501(e) of the Internal Revenue Code, which defines substantial for purposes of civil liability as a misstatement in excess of twenty-five percent of the amount of the gross income reported on the return, is clearly misplaced in the context of a criminal prosecution under Section 7206(1). We therefore conclude that the trial court properly instructed the jury with respect to the tax counts alleged in the indictment.

IV. *FAIR TRIAL ISSUES*

Appellants next contend that they were denied a fair trial, citing numerous trial errors relating to the admissibility of certain evidence and prosecutorial misconduct. Appellants also challenge their convictions on certain counts of the indictment as time-barred by the statute of limitations. We consider these contentions, and facts relevant therto, *seriatim.*

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[7] Section 7206(1) provides, in pertinent part:

Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury. — Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . .

A. *Admissibility of Diary*

In presenting its evidence related to the counts involving the Danley Lumber Company, the government offered into evidence a diary kept by Harry Weitzman, the Danley employee responsible for making payoffs to Chicago Building Inspection Supervisors. Over the vigorous objections of the appellants, the trial court admitted the diary as a business record under Rule 803(6) of the Federal Rules of Evidence.[8] Appellants have renewed their objection on appeal.[9] We conclude that the

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[8] Rule 803(6) of the Federal Rules of Evidence provides:

Records Of Any Regularly Conducted Activity: A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

[9] Subsequent to the submission of briefs and oral argument in this case, the appellants filed with the Court a "Motion To Remand To The Trial Court For Further Proceedings" on the ground that they had received information concerning an Internal Revenue Service investigation into "certain improper statements made by Special Agent Wayne Buback," which purported to impugn the integrity of the diary. The government, in response to his motion, filed with the Court a sealed copy of the Report of the Investigation conducted by the Internal Revenue Service. Upon an *in camera* examination of the Report, we conclude that no information contained therein need be produced pursuant to *Brady* v. *Maryland*, 373 U.S. 88 (1963). Accordingly, the motion is denied.

trial court did not abuse its discretion in admitting the diary into evidence.

Harry Weitzman testified that after several years of making payoffs on behalf of Danley to Building Inspection Supervisors, he began recording these payoffs in a small notebook. The notebook contained an entry for every payoff he had made from 1968 or 1969 until 1976. An entry would be recorded in the office after a payment had been made. Harry Weitzman kept the diary in his desk at work and did not make the diary available to other employees at Danley. Weitzman further testified that the reason for maintaining the diary was to provide documentation if Irving Lazarus, the Vice President of Danley, ever demanded an accounting of the payments made to the supervisors. Despite objections by defense counsel that the diary was inadmissible under Rule 803(6) because it was not used or relied on by other Danley employees, nor required to be kept by Weitzman, and contained inaccuracies, Judge Bua admitted the diary on the basis of the foundation testimony, stating:

> THE COURT: I have heard enough. Mr. Newman, I think the key here in deciding this matter is whether the books record a regularly conducted business activity as opposed to some personal matter that the scrivener or the one who keeps the record is recording, and while it is a close case, I think it comes within the purview of 803(6).
>
> The court takes the position that really this goes—all of your arguments of the defense go, good arguments, go to the weight rather than to the admissibility, and the diary may be introduced into the record pursuant to the provisions of 803(6) of the Federal Rules of Evidence.

Tr. at 281-282.

We agree with the district court that the diary was admissible. In that connection, our decision in *United States* v. *McPartlin,* 595 F.2d 1321 (7th Cir. 1979), is especially pertinent. In *McPartlin,* the government sought to admit into evidence desk calendar-appointment diaries authored by and containing records of the daily business activities of a witness. The diaries were kept strictly for the use of the witness and the entries therein were recorded at or near the time of the activity. The defendants in *McPartlin* objected to the admissibility of the diaries as business records because the entries were not made in sequence and because the diaries were relied on only by the witness. We upheld the admissibility of the diaries under Rule 803(6) on the grounds that they were records kept as part of a business activity and the entries were made with regularity at or near the time of the described event, and that verification by persons other than the one making the entry was unnecessary to establish verification. Moreover, we noted that since the witness had to rely on the entries made, there would be little reason for him to distort or falsify the entries. Finally, we observed that the degree of reliability necessary for the admission of diaries under the business record exception to the hearsay rule was greatly reduced because the declarant testified and was available for cross-examination. *McPartlin, supra* at 1347-1351.

The *ratio decidendi* of *McPartlin* is equally applicable to the contested admissibility of the diary in this case. Harry Weitzman testified that he kept the diary as part of a business activity. The entries were recorded with regularity at or near the date of the payoffs. Since Weitzman believed that he would be required to account to Lazarus for the payments, it was unlikely that he would have made false entries. Similarly, the fact that

Weitzman was not told to keep the diary and did not make it available to others at Danley does not affect its admissibility under Rule 803(6). Finally, in this case, as in *McPartlin,* that the diaries recorded illicit business dealings is of no consequence; the illegal nature of those activities were nevertheless part of the normal business of Danley. *McPartlin, supra* at 1349.

B. *Admissibility of Immunity Testimony*

Appellants also challenge the admissibility of testimony elicited by the government on direct examinations of Bentley Weitzman, Harry Weitzman and Betty Mack, employees of the Danley Lumber Company, concerning the fact that they had been granted immunity. Appellants objected at trial that this testimony was inadmissible because it was used to enhance the credibility of these witnesses rather than to impeach it.

Rule 607 of the Federal Rules of Evidence provides that "[t]he credibility of a witness may be attacked by any party including the party calling him." The government introduced the challenged testimony for purposes of impeachment because it anticipated that defense counsel would cross-examine the witnesses on the issue of immunity. This Court prevoiusly endorsed such a procedure in *United States* v. *Craig,* 573 F.2d 513 (7th Cir. 1978), wherein we observed:

> Defendants further argue that questions and answers concerning the immunized witness' understanding of the terms of immunization convey to the jury the impression that the prosecutor is in a position to personally know whether or not a witness is truthful, and that consequently, the jury is given the appearance of a witness whose veracity is vouched for by the government.

> We find nothing improper about the question of the witness' understanding of the terms of the immunity order in this case. There was no insinuation by the prosecutor, direct or otherwise, that the government possessed knowledge to the exclusion of the jury on the issue of the immunized witness' veracity. *Cf. United States* v. *Creamer,* 555 F.2d 612 (7th Cir. 1977). Further, we believe that the jury's function of assessing credibility and weighing testimony is aided by evidence of an immunized witness' understanding of the terms under which he or she is testifying. Indeed, such questions by the prosecution frequently provide a convenient opening for more exploration of a fertile area on cross-examination.

537 F.2d at 519. We are aware of no persuasive authority to the contrary. The testimony concerning immunity in this case fails to reflect an implication that the government possessed knowledge to the exclusion of the jury on the issue of the immunized witnesses' veracity. Moreover, the trial court instructed the jury that the credibility of the immunized witnesses was susceptible to special scrutiny. Tr. at 1557. Accordingly, we find no impropriety in the admission of this testimony into evidence.

C. *Prosecutorial Misconduct*

Appellants next argue that they were deprived of a fair trial on the basis of prosecutorial misconduct during the government's closing arguments. Specifically, the appellants object to statements of the prosecutor during rebuttal argument that the "victims" in this case were the citizens of Chicago because the city had been denied revenues by the appellants' extortionate activities. This comment was engendered by defense counsel's assertion during closing argument that the government's proof failed to establish that the Danley Lumber Company and others

were victims, as charged in the indictment, because these companies profited from the alleged extortionate activities of the defendants. Since the indictment did not allege the existence of any "victim," the prosecutor's rebuttal argument clearly constituted invited response. It is well settled that where defense counsel makes statements in closing argument that invite the government to respond, the prosecutor may, on rebuttal, enter into areas that would otherwise constitute improper argument. *Malone* v. *United States,* 94 F.2d 281, 288 (7th Cir.), *cert. denied,* 304 U.S. 562 (1938); *United States* v. *Lawler,* 413 F.2d 622, 628-629 (7th Cir. 1969), *cert. denied,* 396 U.S. 1046 (1970). Moreover, the trial court exercised its discretion by limiting the scope of the argument and the prosecutor promptly complied with the limitations imposed by the court. The trial court also instructed the jury that closing arguments did not constitute evidence. These actions served to minimize any prejudice claimed by the appellants to have resulted from the government's rebutal argument. *See United States* v. *Alpern,* 564 F.2d 755, 760 (7th Cir. 1977).

D. *Defective Indictment*

Appellants also contend they were denied a fair trial because Counts One through Thirteen improperly charged the appellants with offenses that were time-barred by the five year statute of limitations prescribed in 18 U.S.C. § 3282. The government concedes that each of these counts alleged an offense commencing on a date outside the statute of limitations, but asserts that the indictment was not defective because each count also alleged an offense continuing until a date after June 13, 1973, five years prior to the date of the return of the indictment.

An indictment under the Hobbs Act alleging a single, continuous plan of extortion with multiple payments begun outside the statute of limitations, but continuing to a date within the statute was upheld in *United States* v. *Provenzano,* 334 F.2d 678 (3d Cir.), *cert. denied,* 379 U.S. 947 (1964). The evidence adduced at trial in this case showed that the appellants engaged in a single, continuous plan of extortion envisioning multiple payments over several years from each named company. These payments began in October 1968 and continued through May 1976, nearly three years after the statute of limitations date. Furthermore, the jury was specifically instructed that the defendants could not be convicted for any offense committed prior to June 13, 1973. We therefore find no impropriety in the charges alleged in the indictment.

V. *SEVERANCE AND SENTENCING*

Appellant Karnick raises two further issues for review. First, he contends that his joinder with the other defendants named in the indictment was improper from the outset under Rule 8 of the Federal Rules of Criminal Procedure. Alternatively, Karnick asserts that his motions for severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure were improperly denied by the trial court. Finally, Karnick challenges the sentence he received on the ground that the district court's decision constituted an abuse of its discretion.

A. *Joinder and Severance*

Rule 8 of the Federal Rules of Criminal Procedure provides for the joinder of offenses and defendants in appropriate cases. Improper joinder under Rule 8 requires mandatory severance. *United States* v. *Spector,* 326 F.2d 345 (7th Cir. 1963). However, a defendant must present

a motion to sever based on misjoinder in order for the trial court to address itself to the issue. *See* Fed.R.Cr.P. 12(f). If the defendant fails to challenge joinder pursuant to Rule 8 prior to trial, he waives his right to raise misjoinder on appeal. *United States* v. *Papadakis,* 510 F.2d 287, 299-300 (2d Cir.), *cert. denied,* 421 U.S. 950 (1975). Since in this case neither Karnick nor any of his co-defendants contested joinder under Rule 8, we deem the question waived for purposes of this appeal.

Appellant Karnick did file a pretrial motion, subsequently renewed at trial, for severance under Rule 14 of the Federal Rules of Criminal Procedure.[10] He now contends that the trial court erred in denying these motions. We find no error.

It is settled that a decision to grant or deny a severance under Rule 14 is discretionary and subject to reversal only upon a showing of clear abuse of that discretion. *United States* v. *Papia,* 560 F.2d 827, 840 (7th Cir. 1977). Our previous decisions have also emphasized that the question of whether a joint trial infringes upon the defendant's right to a fair trial depends on "whether it is within the jury's capacity, given the complexity of the case, to follow admonitory instructions and to keep separate, collate and appraise the evidence relevant only to

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[10] Rule 14 of the Federal Rules of Criminal Procedure provides, in pertinent part:

> Relief From Prejudicial Joinder
>
> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. . . .

each defendant." *United States* v. *Kahn,* 381 F.2d 824, 839 (7th Cir. 1967). *See also United States* v. *Cervantes,* 466 F.2d 736, 739 (7th Cir.), *cert. denied,* 409 U.S. 886 (1972).

Karnick claims that since he was charged in only two of the nineteen counts in the indictment, he was prejudiced by the disparity between the evidence against him and the evidence against his co-defendants. We rejected a similar argument in *United States* v. *Grabiec,* 563 F.2d 313 (7th Cir. 1977), in which we held:

> Although the evidence of culpability was clearly proportionately greater against [co-defendant] Wall than Grabiec, we have pointed out earlier that there was sufficient evidence for a jury to have convicted Grabiec. Also, we have emphasized that the jury was repeatedly instructed to consider evidence regarding other transactions only as it applied to Wall. Under these circumstances, the denials of Grabiec's requests for severance were not errors.

563 F.2d at 319.

The considerations found controlling in *Grabiec* are equally applicable to this case. As stated earlier, there was sufficient evidence to support the jury's verdicts against Karnick. Furthermore, the jury was repeatedly instructed to consider evidence introduced on the other counts only against the defendants charged in those counts. Finally, the jury's verdict of acquittal for appellant Jercich on Count Twelve of the indictment reflects its adherence to those admonitory instructions.

B. *Sentencing*

Karnick also appeals from the sentence imposed by the district court on the grounds that the court abused

its discretion in unduly emphasizing the deterrent effect upon others of the appellant's incarceration.

The sentencing function has traditionally been considered to be within the exclusive province of the trial court, and the exercise of that discretion "will not be disturbed on appeal except on a plain showing of gross abuse." *United States* v. *Willard*, 445 F.2d 814, 816 (7th Cir. 1971) (citation omitted).

An examination of the trial court's remarks at sentencing reveals no abuse of the court's discretionary role. The court indicated that in arriving at sentences he had weighed three factors: (1) the possibility of rehabilitation; (2) the societal interest in retribution; and (3) the deterrence of others. These factors were endorsed by the Supreme Court in *Williams* v. *New York*, 337 U.S. 241 (1949).

Consideration of these factors with respect to the defendants led the court to conclude that it favored "relatively stiff sentences." Since the defendants were convicted of "white collar" crimes, Judge Bua stated that he was not concerned with rehabilitation in the usual sense, although he did note "the failure of these defendants to acknowledge guilt or display any remorse whatever." As to the societal interest, the court regarded the crime of extortion to be one of the most serious prosecuted in the federal courts and further observed that acts of extortion teach the public that "corruption, greed and lawlessness" are accepted behavior in government. Finally, Judge Bua expressed his view that the conviction and sentencing of such criminals would serve the salutary purpose of deterrence. It is within this context that the court made the "message to City Hall"

statement which appellant assails as an abdication of the court's mandatory discretionary role.[11]

We find this objection devoid of merit. The court considered the fact that the defendants may have been influenced by an environment in which corruption seemed prevalent and acceptable to be a mitigating circumstance. The court therefore indicated that it would not impose a harsh sentence, but that future defendants should be on notice as to the court's attitude and should not expect similar light sentences. Viewing the discretionary sentencing process in light of the reasons articulated by Judge Bua for imposing a sentence of one year under a work-release program and a $1,000 fine, when the statutory maximum permitted a sentence of 20 years imprisonment and/or a $10,000 fine, it cannot be said that the court committed a gross abuse of its discretion.

VI. *REMAINING ISSUES*

We have carefully considered the arguments advanced in support of the appellants' other assignments of error on appeal, and in view of the record, find them to be equally without merit. For the foregoing reasons, the judgments appealed from are affirmed and the Clerk of this Court is directed to enter judgment accordingly.
AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

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[11] The court stated:

> It is a part of my duty in sentencing these men to send a message to their fellow workers that all city workers know that justice is swift and sure in the Federal Court, and those who are convicted will be sentenced to jail.

Tr. of Dec. 19, 1978, at 16.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
October 30, 1980
Before
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*

Nos. 78-2617, 78-2618, 78-2619 & 78-2654

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOHN HEDMAN, MICHAEL JERCICH, THOMAS KARNICK and HENRY LARSEN,

Defendants-Appellants.

On Petition for Rehearing and Suggestion for Rehearing En Banc.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by the Defendants-Appellants, John Hedman, Michael Jercich, Thomas Karnick and Henry Larsen, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.*

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* During the pendency of the petition for rehearing, defendants-appellants filed a motion to reconsider en banc the denial of the motion for remand and a supplement to that motion. The defendants-appellants' original motion to remand was denied in this Court's slip opinion of this appeal, decided August 29, 1980. Slip op. at 21, n.9. The panel has reviewed the subsequent motion and supplement filed by defendants-appellants and has determined to deny the motion and reaffirm the original decision on this matter contained in the slip opinion, without however precluding renewed consideration of this issue in post-conviction proceedings. We note also that no judge in active service has requested a vote to reconsider this panel's denial of defendants-appellants' original motion to remand.

APPENDIX C

Constitution and Statutory Provisions and Rules Involved

Amendment V, Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have conpulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 18 U.S.C. § 201(c)

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees

to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty; or

* * *

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

Title 18 U.S.C. § 201(f) and (g)

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; or

* * *

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Title 18 U.S.C. § 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commisison of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Title 18 U.S.C. § 872

Whoever, being an officer, or employee of the United States or any department or agency thereof, or representing himself to be or assuming to act as such, under color or pretense of office or employment commits or attempts an act of extortion, shall be fined not more than $5,000 or imprisoned not more than three years, or both; but if the amount so extorted or demanded does not exceed $100, he shall be fined not more than $500 or imprisoned not more than one year, or both.

Title 18 U.S.C. § 1951

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens

physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Title 18 U.S.C. § 1952

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

Title 21 U.S.C. § 849(e)

(e) A defendant is a special drug offender for purposes of this section if—

(1) the defendant has previously been convicted in courts of the United States or a State or any politi-

cal subdivision thereof for two or more offenses involving dealing in controlled substances, committed on occasions different from one another and different from such felonious violation, and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felonious violation, and less than five years have elapsed between the commission of such felonious violation and either the defendant's release, or parole or otherwise from imprisonment for one such conviction or his commission of the last such previous offense or another offense involving dealing in controlled substances and punishable by death or imprisonment in excess of one year under applicable laws of the United States or a State or any political subdivision thereof; or

(2) the defendant committed such felonious violation as part of a pattern of dealing in controlled substances which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

(3) such felonious violation was, or the defendant committed such felonious violation in furtherance of, a conspiracy with three or more other persons to engage in a pattern of dealing in controlled substances which was criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or dealing, or give or receive a bribe or use force in connection with such dealing.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In support of findings under paragraph (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such dealing. For purposes of paragraph (2) of this subsection, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and fifty-week year, without reference to exceptions, under section 206(a)(1) of Title 29 for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income under section 62 of Title 26. For purposes of paragraph (2) of this subsection, special skill or expertise in such dealing includes unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organization, planning, financing, direction, management, supervision, execution or concealment of such dealing, the enlistment of accomplices in such dealing, the escape from detection or apprehension for such dealing, or the disposition of the fruits or proceeds of such dealing. For purposes of paragraphs (2) and (3) of this subsection, such dealing forms a pattern if it embraches criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

Title 26 U.S.C. § 6501(e)(1)(A)

(e) Substantial omisison of items.—Except as otherwise provided in subsection (c)—

(1) Income taxes.—In the case of any tax imposed by subtitle A—

(A) General rule.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assesed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

Title 26 U.S.C. § 7206(1)

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Rule 8(a) Federal Rules of Criminal Procedure

Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether

felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Rule 8(b) Federal Rules of Criminal Procedure

Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 Federal Rules of Criminal Procedure

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

No. 80-926

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN HEDMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the trial court correctly instructed the jury with regard to the meaning of extortion "under color of official right" under the Hobbs Act, 18 U.S.C. 1951.

2. Whether the trial court correctly instructed the jury with regard to the elements of the tax law violations alleged in the indictment.

3. Whether the trial court properly denied petitioner Karnick's motion for a severance.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 630 F. 2d 1184.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1980. A petition for rehearing was denied on October 30, 1980. The petition for a writ of certiorari was filed on December 9, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiring to commit extortion through the wrongful use of their positions as supervisors for the City of Chicago, in violation of 18 U.S.C. 1951. In addition, petitioner Hedman was convicted on five counts of extortion "under color of official right," in violation of 18 U.S.C. 1951, and two counts of failure to report income received in 1973 and 1974 on his federal income tax returns, in violation of 26 U.S.C. 7206(1). Similarly, petitioner Jercich was convicted on three counts of official extortion and two counts of income tax fraud, and petitioner Larsen was convicted on two counts of official extortion and two counts of income tax fraud. Petitioner Karnick was convicted on one count of extortion. Petitioners Hedman, Larsen and Jercich were sentenced to a term of one year's imprisonment, three years' probation, and a $1,000 fine. Petitioner Karnick was sentenced to a one-year work-release program, three years' probation, and a $1,000 fine. The court of appeals affirmed (Pet. App. A).

From 1968 until 1976, petitioners received illegal payoffs from various construction companies whose projects did not meet building code standards. In return, petitioners knowingly allowed the building to be constructed without a

required building permit or on the basis of a fraudulently obtained permit. For example, since 1959 the Danley Lumber Company constructed a substantial number of garages in Chicago that violated the building code. In lieu of complying with the code and obtaining a proper permit, the president of Danley would deliver cash and slips noting the address of the nonconforming project to petitioners at either their homes or their offices at City Hall. On occasion, one petitioner received an envelope designated for delivery to another petitioner. Likewise, various other companies made numerous payoffs to one or more of the petitioners in order to construct buildings without complying with the code and permit regulations that were petitioners' duty to enforce (Pet. App. 6-10). In addition, the evidence showed that petitioners Hedman, Jercich, and Larsen failed to report the payoffs received from the various companies as income on their 1973 and 1974 tax returns (*id.* at 10).

ARGUMENT

1. Petitioners contend (Pet. 15-26) that the district court improperly instructed the jurors with regard to the extortion element of a Hobbs Act prosecution for taking money "under color of official right." See 18 U.S.C. 1951. Petitioners argue that the Hobbs Act requires proof that the corrupt official initiated or expressly induced the extortionate payment, and that extortion under the Hobbs Act and bribery are mutually exclusive crimes. As the court of appeals correctly concluded, however (Pet. App. 18-19, quoting *United States* v. *Braasch*, 505 F. 2d 139, 151 (7th Cir. 1974)), it is well settled that

> [t]he use of office to obtain payments is the crux of the statutory requirement of "under color of official right," and [petitioners'] wrongful use of official power was obviously the basis of this extortion. * * * It matters not whether the public official induces payments to perform his duties or not to perform his duties * * *.

> So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. That such conduct may also constitute "classic bribery" is not a relevant consideration.

This construction of the Hobbs Act is consistent with the plain meaning and history of the statute (see, *e.g.*, *United States* v. *French*, 628 F. 2d 1069, 1072-1074 (8th Cir. 1980), cert. denied, No. 80-479 (Nov. 3, 1980); *United States* v. *Harding*, 563 F. 2d 299, 304 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *United States* v. *Trotta*, 525 F. 2d 1096, 1099-1100 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976)),[1] and has been adopted by each of the ten courts of appeals that have considered this issue (see, *e.g.*, Pet. App. 17-19; *United States* v. *French*, *supra*; *United States* v. *Williams*, 621 F. 2d 123, 124 (5th Cir. 1980) (collecting cases); *United States* v. *Grande*, 620 F. 2d 1026, 1031 (4th Cir. 1980); *United States* v. *Butler*, 618 F. 2d 411, 417-420 (6th Cir. 1980), cert. denied, No. 79-6479 (June 16, 1980); *United States* v. *Cerilli*, 603 F. 2d 415, 425-426 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Phillips*, 577 F. 2d 495, 503 (9th Cir.), cert. denied, 439 U.S. 831 (1978); *United States* v. *Hall*, 536 F. 2d 313, 321 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *Hathaway*, 534 F. 2d 386, 393 (1st Cir.), cert. denied, 429 U.S. 819 (1976); *United States* v. *Trotta*, *supra*). And for the same reasons that this Court has repeatedly declined to

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[1] Notwithstanding petitioners' claims to the contrary (Pet. 20-23), the most natural construction of the Hobbs Act as applied to official extortion requires the government to prove "the obtaining of property from another, with his consent, * * * under color of official right" (18 U.S.C. 1951(b)(2)). Moreover, official extortion at common law included both "demanding" money and "taking" money if the defendant was a public official. See, *e.g.*, *United States* v. *French*, *supra*, 628 F. 2d at 1072-1074; *United States* v. *Laudani*, 134 F. 2d 847, 851 n. 1 (3d Cir. 1943).

review the Hobbs Act convictions in those cases (see, *e.g.*, *Butler* v. *United States*, No. 79-6479 (June 16, 1980); *French* v. *United States*, No. 80-479 (Nov. 3, 1980); *Cerilli* v. *United States*, 444 U.S. 1043 (1980); *Trotta* v. *United States*, 425 U.S. 971 (1976); *Mazzei* v. *United States*, 423 U.S. 1014 (1975); *Braasch* v. *United States*, 421 U.S. 910 (1975)), so too further review of petitioners' contentions regarding the Hobbs Act is unwarranted here.[2]

2. Petitioners Hedman, Jercich, and Larsen also challenge (Pet. 26-29) the trial court's instructions to the jury regarding the income tax charges against them under 26 U.S.C. 7206(1). Citing 26 U.S.C. 6501, petitioners argue that the court should have told the jurors that the government had to prove a "substantial" understatement of income in each year in excess of 25% of the actual income received in that year. But, as the court of appeals pointed out (Pet. App. 22), Section 6501 is a civil tax provision

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[2]Petitioners erroneously suggest (Pet. 16-19, 24-25) that there is a conflict among the courts of appeals on these issues. The decisions cited above squarely refute this claim. We further note that, with one possible exception, the cases cited by petitioners are in accord with the cases cited above in recognizing that bribery and extortion are not mutually exclusive and that a public official violates the Hobbs Act by wrongfully taking money paid on account of his position whether or not he actively seeks the payoff. See *United States* v. *Wright*, 588 F. 2d 31, 35 n.2 (2d Cir. 1978) (citing with approval *United States* v. *Trotta*, *supra*); *United States* v. *Shelton*, 573 F. 2d 917, 920 (6th Cir. 1978); *United States* v. *Adcock*, 558 F. 2d 397, 403 (8th Cir. 1977); *United States* v. *Hyde*, 448 F. 2d 815, 832-833 (5th Cir. 1971). In *United States* v. *Addonizio*, 451 F. 2d 49, 72-73 (3d Cir. 1971), cert. denied, 405 U.S. 936 (1972), the court of appeals arguably indicated that extortion under the Act and bribery may be distinct crimes. Subsequently, however, the Third Circuit has rejected this reading of the *Addonizio* decision and has repeatedly concluded that "where extortion under color of official right is charged, one need not prove that the payment was obtained by force, fear or duress." *United States* v. *Cerilli*, *supra*, 603 F. 2d at 425. See, *e.g.*, *United States* v. *Mazzei*, 521 F. 2d 639, 643-645 (3d Cir.), cert. denied, 423 U.S. 1014 (1975); *United States* v. *Kenny*, 462 F. 2d 1205, 1229 (3d Cir.), cert. denied, 409 U.S. 914 (1972).

concerning the applicable statute of limitations in certain civil proceedings and has no relevance at all to a criminal prosecution under 26 U.S.C. 7206(1). And Section 7206(1) proscribes any willful, material misstatement in a tax return, regardless of its magnitude. Thus, materiality and not "substantiality" is the prescribed element of the crime for which petitioners were charged and convicted.

Petitioners correctly note that the indictment alleged that petitioners believed that their actual income was "substantially" in excess of their reported income. Even assuming that petitioners were entitled to a charge reflecting this surplusage in the indictment (but cf. *Berger* v. *United States,* 295 U.S. 78, 81-82 (1935)), the district court in fact instructed the jurors that "each of the tax counts alleges that the particular defendant received *substantial* other income in addition to the total income reported on the return" and that the government must "prove[] beyond a reasonable doubt that the defendant had income *substantially* in excess of the total income he reported on his return" (Pet. App. 21 n.6).[3] In short, the indictment and trial court's charge

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[3]The court charged the jurors as follows (Pet. App. 21 n.6; Tr. 1572-1573):

> To convict a defendant [of making false statements on a federal income tax return] the government must prove each of the following three elements beyond a reasonable doubt:
>
> 1. the willful making and subscribing of a return filed with the Internal Revenue Service that was incorrect as to a material matter;
>
> 2. that the return contained a written declaration that it was made under the penalty of perjury; and
>
> 3. that the defendant did not believe the return to be true and correct as to the material matter charged in the indictment.
>
> The jury is further instructed that each of the tax counts alleges that the particular defendant received substantial other income in addition to the total income reported on the return. It is not

regarding the tax counts were more favorable to petitioners than required by Section 7206(1). Accordingly, petitioners have no cause to complain. Cf. *Heisler* v. *United States*, 394 F. 2d 692, 695-696 (9th Cir. 1968).

3. Finally, petitioner Karnick contends (Pet. 29-40) that his joinder with the other petitioners was improper under Fed. R. Crim. P. 8 and that the trial court should have granted his motion for a severance under Fed. R. Crim. P. 14. At the outset, we note that petitioner failed to challenge the joinder prior to trial and therefore waived any objection on this ground. See Fed. R. Crim. P. 12(b) & (f); *United States* v. *Papadakis*, 510 F. 2d 287, 299-300 (2d Cir.), cert. denied, 421 U.S. 950 (1975). In any event, Rule 8 provides that joinder of two or more defendants is proper "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Here, petitioner Karnick was charged and convicted of conspiring with his co-defendants to extort money. In addition, the substantive extortion offense with which he was charged was closely connected in time, place, occasion and manner with the other substantive offenses asserted against his fellow employees. Accordingly, joinder was proper. See, *e.g.*, *United States* v. *Santoni*, 585 F. 2d 667, 673 (4th Cir. 1978), cert. denied, 440

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necessary for the government to prove the exact amount of the additional income. It is sufficient if the government proves beyond a reasonable doubt that the defendant had income substantially in excess of the total income he reported on his return.

The false statement alleged in each of the tax counts is that the total income reported on the return involved did not contain substantial other income purportedly received by the particular defendant. The Court instructs you that a statement of total income on a tax return is material as a matter of law.

U.S. 910 (1979); *United States* v. *Patterson*, 455 F. 2d 264, 266 (9th Cir. 1972); *United States* v. *Daddano*, 432 F. 2d 1119, 1125 (7th Cir. 1970), cert. denied, 402 U.S. 905 (1971).[4]

Likewise, there is no merit to petitioner Karnick's claim that the denial of his severance motion deprived him of a fair trial. It is well settled that the trial court has broad discretion to grant or deny a severance, and its decision will not be reversed unless there is a clear abuse of discretion. See, *e.g.*, *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *Schaffer* v. *United States*, 362 U.S. 511 (1960); *United States* v. *Adams*, 581 F. 2d 193, 198 (9th Cir.), cert. denied, 439 U.S. 1006 (1978). Moreover, the mere presence of hostility among, or disparity of evidence against, the defendants is insufficient ground to require a separate trial. See, *e.g.*, *United States* v. *Grabiec*, 563 F. 2d 313, 319 (7th Cir. 1977); *United States* v. *Ehrlichman*, 546 F. 2d 910, 929 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977); *United States* v. *Barber*, 442 F. 2d 517, 530 (3d Cir.), cert. denied, 404 U.S. 958 (1971). Rather, a defendant is entitled to a severance only if he makes a compelling showing of substantial prejudice. See, *e.g.*, *United States* v. *Crawford*, 581 F. 2d 489, 491 (5th Cir. 1978); *United States* v. *Cella*, 568 F. 2d 1266, 1288 (9th Cir. 1977); *United States* v. *Di Giovanni*, 544 F. 2d 642, 644 (2d Cir. 1976); Fed. R. Crim. P. 14.

Here, the courts below properly concluded (Pet. App. 29-31) that the possibility of prejudice was far outweighed by "the need to conserve judicial resources and to avoid further crowding of federal trial calendars with a succession of factually related actions." *United States* v. *McDonald*,

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[4]In *United States* v. *Nettles*, 570 F. 2d 547 (5th Cir. 1978), and *United States* v. *Gentile*, 495 F. 2d 626 (5th Cir. 1974), on which petitioner Karnick relies (Pet. 33-34), the evidence failed to show any common scheme, plan or association among the defendants.

576 F. 2d 1350, 1355 (9th Cir.), cert. denied, 439 U.S. 830 (1978). The charges against petitioner Karnick were substantially related to the counts against his co-defendants. Moreover, the evidence against Karnick was strong and convincing, and the trial judge carefully and repeatedly instructed the jurors to consider separately the evidence introduced on each count and against each defendant (Pet. App. 31). In addition, petitioner Karnick identifies no irreconcilable conflict among the defenses proffered at trial. In these circumstances, the district court correctly denied petitioner Karnick's motion for a severance. See, *e.g., United States* v. *Boyd,* 595 F. 2d 120, 125 (3d Cir. 1978); *United States* v. *Avarello,* 592 F. 2d 1339, 1346 & n.10 (5th Cir.), cert. denied, 444 U.S. 844 (1979); *United States* v. *Fuel,* 583 F. 2d 978, 988 (8th Cir. 1978), cert. denied, 439 U.S. 1127 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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